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State v. Woodson, recently decided by the Supreme Court of Missouri, serves to remind us that good judges will often differ about questions of law, which to the ordinary mind seem plain and free from substantial difficulty. The case referred to was an election contest, the lower court having decided in favor of the contestant. The contestee appealed and the exact question presented above was whether an appeal duly taken, with bond given as provided by statute, suspends the execution of a judgment by the lower court. The majority of the court held that it did not, notwithstanding that the statute governing contested elections, provides that "in every case of a pending contested election, the person holding the certificate of election may give bond, qualify and take the office * * * until the contest shall be decided," and though the right of an appeal in a contested election case was undoubted. The court, it must be said, grounded its decision upon a construction of the language of the statute governing appeals. The dissenting judges, however, contended, and we think with reason, that the words of the statute "until the contest shall be decided" refer to the final decision of the contest, whenever that may occur, and that no intermediate judgment duly appealed from should be carried into execution during such an appeal. Of course the question presented was one largely of construction of statutes, but, as it seems to us, the view of the dissenting judges was clearly the correct one. If, as the dissenting judges say, the conclusion of the court is warranted and if each decision during the progress of the case is to be held final, for the purpose of effecting a change of officers, we might, in one contest, see, first, the contestee filling the disputed office, under his certificate of election; next, the contestant taking it under a judgment of the Circuit Court; then, upon a possible reversal of that judgment for some error of law, the contestee would be replaced, until a second trial could occur on the circuit, with, perhaps more changes upon further litigation. Thus, the office might be tossed about like a shuttlecock between the two claimants until the contest should be "decided" by a judgment, which would really be the conclusion of the law as applied to the controversy. We do not believe such results were intended by the statutes on this subject, and hence that a construction permitting those results is not sound.

The case of Farley v. Bateman, decided by the Supreme Court of Appeals of West Virginia is noteworthy, not so much for what it decides as for the very forcible language of Dent, J., in illustrating the keen eye of a court of equity in detecting fraud. "A boy," he says, "may satisfy his mother that his wet hair is the result of sweat, and not of his going in swimming contrary to her commands, but he will hardly convince her that his back and arms were sunburned, and his shirt turned wrong side out, in crawling through a rail fence backwards." The case turned upon a question of notice by a subsequent purchaser of a prior undocketed judgment and the court used the above impressive language to show that the fact of notice may be inferred from circumstances, as well as proved by direct evidence.

The decision of the Supreme Court of Illinois declaring the whisky trust to be illegal is a telling blow at "trusts" in general, and will doubtless prove far reaching. The Illinois court holds that what is known as the whisky trust exceeded the powers conferred by its charter by forming a combination to control prices rather than to manufacture whisky. The claim made by the trust that the surrendering and gathering in of the stock of different distilleries purged the trust of illegality was disposed of by the court with the declaration that there is no magic in a trust certificate that can remove the taint of illegality from the trust scheme. It was urged on behalf of the trust that by its charter it was authorized to purchase and own distillery property, and that there was no limit placed upon the amount of property which it might thus acquire. The court, however, declares that by its certificate of organization it was only authorized to engage in the general distillery business in Illinois and elsewhere and to own the property necessary for that pur-

pose. Grants of power in corporate charters, the court says, are to be construed strictly, and what is not given is by implication denied, and the trust is authorized to own such property only as is necessary for its business and no more. The court further declares that in accumulating distillery property in the manner and for the purpose shown the trust not only misused and abused the powers granted by its charter, but usurped and exercised powers not conferred by and wholly foreign to that instrument, so that the judgment of ouster was clearly warranted.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATION — LIABILITY FOR TORTS.—In the recent case of Love v. City of Atlanta, 22 S. E. Rep. 29, the Supreme Court of Georgia discusses the anomalous condition of the law on the subject of the liability of a municipal corporation for torts. The action was founded on injuries sustained by plaintiff through having the buggy, in which he was riding, collided with by a runaway mule, in charge of a small negro boy and attached to a garbage cart. It was alleged that the driver of the cart was negligent, and, moreover, that he was incompetent for the discharge of his assigned duty, and that the mule was vicious, dangerous and liable to run away. The direction of a verdict for defendant was affirmed on the ground that the removal of garbage was a "governmental function," as it concerned the public health, and that, therefore, the municipality was not liable for negligence committed in connection with the performance of such public duty. The following is from the opinion:

Distinctions do not appear to have been at all times accurately drawn between the classes of cases in which a municipal corporation would be liable and those in which it would not be liable for the misfeasance or non-feasance of a public servant employed under municipal authority in the discharge of duties relating to corporate affairs. One general proposition, however, seems to have received general recognition at the hands of courts of last resort wherever that class of cases has been considered, and that class of cases is that, where an injury sustained is inflicted because of the misfeasance of an agent of a corporation while engaged in a duty pertinent to the exercise of what are termed "governmental functions of a corporation," the city is not liable. Where injuries under similar circumstances are inflicted by the agent of a corporation acting for it in the discharge of a duty on behalf of a municipal corporation where it is engaged in the exercise of some private franchise, or some franchise conferred upon it by law which it may exercise for the private profit or convenience of the corporation or for the convenience of its citizens alone, in which the general public has no interest, for such injuries a right of recovery lies against the city. Some difficulty has arisen in the application of these general principles to the facts of particular cases which, from time to time, have arisen. Some difficulty has arisen in the proper classification of cases in order to assign each to its appropriate position with reference to the liability or non-liability of a corporation, and the courts have not been altogether happy nor entirely consistent at all times in this regard. As an illustration of this, it is held that cities are liable for damages resulting from the non-repair or from the dangerous condition of public streets, and this in the absence of strict statutory liability imposed by law. It has been held that they are not liable for damages occasioned by their fire departments for injuries to persons or property in going to or from fires. The former case is one that might properly have been originally classified among the cases of non-liability. The duty of keeping its streets in repair is a public duty, in which the general public is interested. The State commits to it the discharge of those governmental duties incident to the sovereign power, by which it is required to maintain for the use of the general public and for the public convenience a system of roads throughout the State, and the assignment of this particular duty to municipal corporations within their limits may fairly be said to be a delegation of what appears to us to be one of the functions of the government. The latter case, referring to the fire department, is a case of non-liability, and, if not the exercise of a private power for the benefit of the corporation itself and the inhabitants thereof, in which the general public in no way participates, it reaches the verge upon that line. We cite these as simple illustrations of our statement that the courts have not at all times been consistent, but with no purpose either to disturb the precedents established by repeated rulings of respectable courts of last resort in nearly all the States, or to intimate that there is such a doubt as to their soundness as would in any sense justify the adoption of other rules. With respect to matters concerning the public health, however, there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolve upon the State as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain, and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the State, the State is acting strictly in the discharge of one of the functions of government. If the State delegate to a municipal corporation, either by general law or particular statute, this power, and impose upon it, within its limits, the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such powers is entitled to the same immunity against suit as the State itself enjoys. Such a duty would stand

upon the same footing as its duty to preserve the public peace, and its liability or non-liability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty.

CRIMINAL LAW—RECEPTION OF VERDICT—ABSENCE OF DEFENDANT.—In Commonwealth v. McCarthy, decided by the Supreme Judicial Court of Massachusetts, it is held that when a defendant on trial for felony, who is on bail, voluntarily absents himself without leave when the jury retire to consider the case, and remains absent, a verdict rendered in his absence will be binding. Knowlton, J., says:

It is a general rule, both in England and in this country, that a trial for a felony cannot be had without the personal presence of the accused. 1 Co. Inst. 227*b*; 3 Co. Inst. 110; 1 Chit. Cr. Law, 635, 636; Rex v. Ladsingham, T. Raym. 193, 2 Keb. 687, and Vent. 97; 2 Hale, P. C. 298-300; 4 Bl. Comm. 375; State v. Hurlbut, 1 Root, 90; People v. Perkins, 1 Wend. 91; Sargent v. State, 11 Ohio, 472; Jones v. State, 26 Ohio St. 208; Prine v. Com., 18 Pa. St. 103; State v. France, 1 Overt. 436; Harriman v. State, 2 G. Greene, 271; Cole v. State, 10 Ark. 318; State v. Hughes, 2 Ala. 102; State v. Battle, 7 Ala. 259; Kelly v. State, 3 Smedes & M. 518; State v. Cross, 27 Mo. 332; People v. Kohler, 5 Cal. 72. The trial is not concluded until the verdict is received and recorded. Maurer v. People, 43 N. Y. 1, and cases above cited. In this commonwealth we have a statute which embodies the same general rule. Pub. St. ch. 214, § 10. See Com. v. Costello, 121 Mass. 371. Under this statute, as well as at the common law, it may well be held that, when a defendant is in custody under an indictment for a felony, the verdict cannot properly be taken in his case without his personal presence, even if he has been in attendance in all previous stages of the trial, and that, whether he is in custody or on bail, the trial cannot properly be begun in his absence. But whether a defendant who is on bail, and who has been present during his trial until the case has been given to the jury, can nullify the whole proceedings by absenting himself until it becomes necessary to discharge the jury, is a very different question. We have seen no well-considered case that decides this question in the affirmative. In most of the reported cases the defendant was in custody, and the failure of the authorities to have him present when the verdict was taken deprived him of a right; in others, when the defendant was on bail, there was an attempt to convict him without his being present at all; and in two or three others the general rule was applied, without discussion, to the case of a defendant on bail who had been present during a part of the trial, and was absent when the verdict was rendered. But it has been repeatedly held, upon careful consideration, that while it is a right of the defendant indicted for a felony to be present when the verdict is rendered, as well as during the earlier parts of the trial, and while it is irregular and improper to begin the trial in such a case without the presence of the accused, yet if he is on bail, and is present at the commencement of the trial, and afterwards voluntarily departs without leave, and is absent when the verdict is returned, he may be defaulted, and a verdict which will be binding upon him may be taken in his absence. Fight v. State, 7 Ohio, pt. 1, 180; Wilson v. State, 2 Ohio St. 319; Price v. State, 36 Miss. 531; Hill v. State, 17 Wis. 675; State v. Wamier, 16 Ind. 357. See also, Lynch v. Com., 88 Pa. St. 189. Such a case is treated as an exception to the general rule, and as a waiver by the defendant of his right to be present.

The principal object of the general rule above referred to is that the defendant may have an opportunity to exercise his right of challenge, and may avail himself of other rights which cannot be so well exercised, if exercised at all, by his counsel in his absence. Another object is that he may be present at the end of the trial to receive the sentence of the court if found guilty; but under a system like ours, where the prisoner is allowed to give bail and to go at large during the hours that the court is not in session until the end of the trial, and afterwards, if there are exceptions, or if there is a motion for a new trial, until these matters are disposed of, it would be unreasonable to hold that he can attend until the case is given to the jury, and, when he sees indications that the verdict is to be against him, can make it impossible to complete the trial, and thus nullify all that has been done by absconding. If he could do this, it would be necessary upon his return to try him again *de novo*, when, perhaps, it would be impossible to procure the evidence which was introduced at the first trial, and when, if he were again admitted to bail, he might a second time defeat the ends of justice by again departing. His departure under such circumstances ought to be deemed a waiver of his right to be present at the taking of the verdict. If the commonwealth has done all that it can reasonably be required to do to secure him his rights, our statute, and the common law of which it is declaratory, ought not to be so construed as to prevent the return of the verdict. This final act of the jury is nothing more than a formal announcement of the result of a trial which up to that point has proceeded with unquestionable regularity. There is no very important reason for requiring the defendant's presence then. It is well that he should be there, ready to receive the sentence of the court, but the possibility of his absence is a risk to the commonwealth, which necessarily results from his admission to bail. He has a right to be personally present to take advantage of irregularities if there should be any; but when he voluntarily absents himself, he cannot complain if the commonwealth chooses to take the verdict when he cannot be immediately subjected to a sentence. The suggestion that the jurors should be required to look upon him, when about to return their verdict, with the possibility that they may see something in his appearance that time which will affect them in the performance of their duty, is not founded upon any important principle of law or good reason in the practical administration of justice. No detriment can ever come to a defendant from this construction of our statute, and a different construction of it would make it in some cases an instrument of great injustice.

Without determining what power the court has, if any, after the commencement of the trial of a criminal case, to secure the attendance of the defendant when the jury are ready to return their verdict, we are of opinion that the ruling at the trial was correct. Exceptions overruled.

MANDAMUS—COLLECTION OF TAXES.—The Supreme Court of Michigan decided in Eyke City Treasurer v. Lange, 63 N. W. Rep. 536, that *mandamus* will not lie against the

cashier of a bank for collection of taxes assessed against a stockholder upon his stock, as another and more adequate remedy exists. The court says:

This tax appears to have been assessed under the law of 1889. See 90 Mich. 592, 51 N. W. Rep. 680. Section 33 makes it the duty of the cashier to pay such tax, and this has been held to mean that the bank shall pay such taxes upon notice to the cashier. Section 34 provides for the collection of taxes by action at law or distress. It is true that this section, strictly construed, would limit the right to actions against the persons assessed; but a reasonable construction of the two sections, taken together, would warrant resort to an action at law against the bank, and this construction is justified by the language of Mr. Justice Cooley, that "it has been shown that taxes are not 'debts' in the ordinary acception of that term, and that the statutory measures are to be resorted to for their collection. Generally, no others are admissible. But the remedy by suit may be given by statute either directly or by implication. If no specific remedy is expressly given, or only an imperfect or inadequate one, the presumption that a remedy by suit was intended is but reasonable. Nothing need be said regarding the proceeding in such suits beyond this: that they would take the ordinary course prescribed by law for the collection of money demands, except as the statute may have otherwise provided." Cooley, Tax'n, 1st ed, p. 300; see, also, *Id.* 2d ed, pp. 15, 16. Here the law makes it the duty of the cashier (*i. e*, the bank) to pay in such case, under the above authority, an action would lie; and especially would it be held proper in view of section 34. In Bank v. Douglass Co., 1 Cent. Law J. 584, Fed. Cas. No. 4,799, it was held by Dillon J., that in a similar case the tax might be enforced by distraint upon the property of the bank. The statute of Nebraska, which applied to the case, provided that "the taxes against such shares shall be levied against the holder of the same in the list of personal property, and shall be paid by the bank." Apparently, the statute of Michigan affords a more complete remedy than that of Nebraska. The significance of this is that, there being the adequate remedy, *mandamus* will not lie. It is a rule of general application that *mandamus* is not to be resorted to if another adequate remedy exists. Merrill, Nand., sec. 17. This has been repeatedly held in this State. People v. Jackson Circuit Judges, 1 Doug. (Mich.) 302; People v. Branch Circuit Judges, *Id.* 319; People v. Wayne Circuit Judges, 1 Mich. 359, 19 Mich. 296; People v. Allegan Circuit Judge, 29 Mich. 487; Burt v. Wayne Circuit Judge, 82 Mich. 251, 46 N. W. Rep. 380; Borby v. Durfee, 96 Mich. 11, 55 N. W. Rep. 386. *Mandamus* is not adapted to the collection of debts, and is not to be used for that purpose. Merrill, Mand. sec. 17. And, if it be said that a tax is not a debt, the fact remains that questions are likely to arise when the legality of a tax is disputed, which cannot well be tried in such proceeding.

It is also significant that the law does not provide for such method of collection. It is strenuously urged in behalf of relator that the law does not provide for collection against the bank by action, and it is inconsistent to give such a reason for invoking a remedy upon which the statute is also silent. Cases are rare when *mandamus* has been sustained for the collection of taxes. Our attention is called to four—three from Maryland and one from Vermont: Emory v. State, 41 Md. 38; State v. Mayhew, 2 Gill, 487; Barney v. State, 42 Md. 480; McVeagh v. City of Chicago, 49 Ill. 318; Town of St. Albans v. National Car Co., 57 Vt. 68. In Barney v. State the propriety of the remedy by *mandamus* appears not to have been discussed. The earlier case of Emory v. State, 41 Md. 38 expressly refers to State v. Mayhew as authority for the proceeding. In that case the proceedings were sustained, but it was expressly decided upon the ground that *mandamus* was the only existing remedy. McVeagh v. City of Chicago arose under a statute authorizing banks to pay the taxes of stockholders from their dividends. It was held that the bank might be compelled to appropriate the dividends to pay the taxes. It does not appear that the statute provided any procedure or remedy, or that there was a liability upon the bank, other than the duty to appropriate dividends to payment.

In this case the question before us is discussed only so far as to assert the right of the State "to use any means, summary or otherwise, not prohibited by a higher power, to collect them," and "that *mandamus* is among them." The case of State v. Mayhew is cited, and approved in general terms. The statement that the State "is entitled to use any method not prohibted," unless it refers to a statutory right, is at variance with the doctrine of a cloud of cases cited by Mr. Justice Cooley in his work on Taxation, to the contrary. Cooley, Tax'n, 2d Ed. 15, 16 and note. In Town of St. Albans v. National Car Co., the court admitted that the writ should not issue if the petitioner had any adequate remedy at law. It expressed doubt of the right of action against the bank, and intimated that an action at law would not be an adequate remedy because too slow. If this remedy exists, it must be because the defendant is a corporation; for taxes assessed against a private person cannot be collected by *mandamus*. See Merrill Mand. sec. 23, and cases cited; *Id.* sec. 156. *Mandamus* will lie against a private corporation when it owes a public duty arising out of its franchises. *Id.* sec. 159. But this is only in cases where there is no other adequate remedy. *Id.* sec. 163. In Person v. Railroad, 32 N. J. Law, 441, *mandamus* to compel payment to taxes issued where there was no other remedy.

This tax might have been collected by distress or action against the bank, and we have already held that it could not be collected by action against the cashier. But, where there is another adequate remedy, there would seem to be no greater necessity for the use of this remedy in cases of corporations than in those of private persons; and there are the same objections. We are convinced that *mandamus* is not a proper remedy against either, and that the order denying the writ was right.

CONTRACT — RESCISSION — IGNORANCE OF LAW — FRAUDULENT REPRESENTATIONS.—In Titus v. Rochester German Insurance Co., 31 S. W. Rep. 127, it is decided by the Court of Appeals of Kentucky that a settlement of a claim for half the amount a party was entitled to made in ignorance of the law and on the fraudulent representations of the other party, who knew of such ignorance and who knew the rights of the parties will be set aside. The court says:

It is true that the ignorance relied upon is an igno-

rance of law, rather than of facts, and that this is not always or perhaps generally, and when standing alone, available as a ground of relief against an executed contract, no matter how inequitable it may be. On this point the decisions of the courts of this country, as well as the English courts, are by no means uniform; but, in our opinion, the weight of authority and the decisions of this court would now forbid that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, and made it the more dense by his own false and fraudulent misrepresentations, but has willfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the general doctrine that a mere mistake of law affords no ground for relief. This view seems to be upheld by many, if not all, of the modern text writers who are recognized as authority on the question. Mr. Kerr, in his well-known work, in treating of this subject, says: "But if it appear that the mistake was induced or encouraged by the misrepresentations of the other party to the transaction, or was perceived by him, and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." Kerr, Fraud & M. pp. 399, 400. And, in his work on Equity, Mr. Bispham lays down this doctrine in even stronger and less uncertain terms. He says: "Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentations of the other party." Bisp. Eq. § 188. Under the admitted facts of this case and the circumstances surrounding and leading up to the mistake relied on here, it is clearly brought within the text above quoted; and many other authorities to the same effect, including reported cases in many of the States of this Union, might be cited, if it were necessary.

We fully recognize the wisdom of that rule which always inclines the courts to uphold and enforce the validity of voluntary compromises and adjustments between parties of their legal differences, when fairly arrived at. Nor would any mere ignorance of or mistake in the law governing any doubtful and disputed legal proposition, on part of either of the parties to the compromise, in the absence of evidence tending to show that he has been overreached or unfairly dealt with or taken advantage of, and where supported by a good consideration, be sufficient, in our judgment, to justify the rescission of a compromise settlement deliberately made between parties, standing upon an equal footing, and with full knowledge of all the facts. If every mistake of law were sufficient to warrant the interference of the courts, then no compromise of a disputed legal proposition would be final, for in every such case one party or the other to the controversy is mistaken as to the law of the case. Upon the record before us, there may be some question as to how far there was a controversy between these parties over any doubtful legal question that might have been litigated in court, or exactly what was the nature and extent of the same. It is alleged in the petition that appellee claimed that all rights of appellant under his policy of insurance were forfeited by reason of the existence of an incumbrance upon a part of the insured property; but it is further alleged that appellee, at the time the contract of insurance was made, "had full knowledge of the same, and, having such knowledge, made the contract, and issued the policy aforesaid." This allegation is admitted to be true, and, in the absence of anything further in the pleading pertaining to this point, we are unable to see in this the basis of a doubtful disputed legal proposition which might have been litigated in the courts, or to know exactly what controversy was settled by the parties. But waiving the question as to the nature and intent of the controversy between appellant and appellee, and reverting to the character of the compromises which courts will uphold, we now quote from another text writer, who uses this language, to-wit: "Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision. Of course, there must not only be no misrepresentation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others." Pom. Eq. Jur. § 850. Under the authorities quoted, it is manifest that the compromise contract sought to be rescinded here is within the control of a court of equity, and may be set aside. And now, referring to the decisions of this court, and to the doctrine established in this State, it seems to us still clearer that the contract complained of, and which was made under the circumstances set forth in the petition and admitted by appellee, cannot be sustained. In an exhaustive opinion, in which the authorities were ably reviewed, by Judge Robertson, after referring to the difficulty of determining in every case when a contract was, in fact, made under a mistake of law, it is said: "When it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no fair compromise of *bona fide* and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." Underwood v. Brockman, 4 Dana, 309. In the case of Ray v. Bank, 3 B. Mon. 510, this court referred to and approved the above case, and said: "Upon the whole, we would remark that whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back." Both of these cases are cited with approval in the case of Louisville & N. R. Co. v. Hopkins Co., 87 Ky. 613, 9 S. W. Rep. 497, and the doctrine laid down therein has not been departed from by this court. It will be seen that the question of fraud did not enter into the decision of either of those cases, but that they are almost entirely based upon the fact that there was no good consideration to uphold the contracts; that it was not a fair compromise of *bona fide* and doubtful claims; and that the money was not in law, honor, or conscience payable, and ought not in honor or good conscience to be retained. If, for these reasons, a contract made under a clear mistake of law may be set aside, then how much stronger reason is there for annulling the contract under consideration?

DOES AN ALDERMAN DULY ELECTED AND QUALIFIED VACATE HIS OFFICE BY REMOVAL FROM THE WARD IN WHICH HE WAS ELECTED?

Does an alderman, eligible and duly elected, who has been declared elected by the council and properly qualified as alderman, vacate his office by subsequently removing from the ward in which he was elected to another ward of the city? The question is an important one which may frequently arise, and upon which there is very little authority from any source.

It has frequently been held, that in the absence of a constitution or statute prohibiting it, municipal officers may be elected from non-residents of the municipal corporation. Such was the common law rule.[1] Many States have statutes similar to the Iowa statute which provides: "The qualified electors of each ward shall, on the first Monday of March of each year, elect by a plurality of votes one member of the city council, who shall at the time be a resident of the ward and a duly qualified elector therein. His term of office shall be two years, so that there may always be in the council two members from the same ward whose term of office shall expire in different years."[2] Such statutes being in derogation of the common law are strictly construed. The common law will be held to be no further abrogated than is expressly declared, or the clear import of the language used absolutely requires.[3] Statutes like the one quoted limit the qualifications of aldermen, by express language, only to the extent that at the time of their election they must be residents and qualified electors of the respective wards from which they are elected, but are silent as to their intention whether aldermen thus elected must continue such residence during their entire terms. The question has been passed upon by the court of last resort of but one State, Indiana,[4] although in Minnesota somewhat similar provisions were held to relate to the officer's eligibility and qualification for election and not to his subsequent residence.[5]

This dearth of authority was commented upon in a case involving this question tried at *nisi prius* in the District Court of Lee County, Iowa,[6] at Fort Madison, by Judge James D. Smyth of Burlington. Fort Madison is a city of five wards and ten aldermen.

The defendant was, at the time of his election, in the second ward, a resident and duly qualified elector of said ward. He was declared elected and qualified. Subsequently he removed to the third ward, and the council, by a vote less than two-thirds required by the ordinance and State statute, declared his seat vacant. He still attempted to occupy his office and *quo warranto* was brought against him. Judge Smyth construing the statute strictly, rendered judgment for the defendant. His elaborate written opinion was so logical and forcible, that although partisan feeling was greatly stirred by the contest, the decision was acquiesced in by plaintiff's counsel and no appeal was taken. The opportunity of obtaining a construction of the statute by the Supreme Court was thus lost.[7]

[1] State v. George, 23 Fla. 585, 3 South. Rep. 81; State v. Swearingen, 12 Ga. 23; 1 Dillon Munic. Corps., § 195; State v. Blanchard, 6 La. Ann. 515.

[2] Iowa Code, § 521.

[3] Moyer v. Penn Slate Co., 71 Pa. St. 293; Esterley's Appeal, 54 *Id.* 192; Thompson v. Weller, 85 Ill. 197.

[4] State v. Craig, 31 N. E. Rep. 352.

[5] State v. Holman, 59 N. W. Rep. 1006.

[6] State v. Moore.

[7] Judge Smyth in part said: "As there is therefore nothing in the express language of this statute limiting the qualifications of aldermen as to residence after they had been duly elected, so I do not see that any additional limitation can be said to be necessarily implied in its provisions and that being true it is of course not proper for the court to interpolate or add other restrictions not warranted by the recognized rules of statutory construction, no matter how reasonable or just additional restrictions might seem. Failing, then, to find in this statute any requirement that aldermen must remain during their incumbency residents of the ward from which they are elected, it is proper next to inquire whether or not there is any other statutory provision relating to the tenure of the office of alderman, and in this connection the plaintiff's counsel cite § 781, of the Code, which provides that every civil office shall become vacant in case the incumbent ceases to be 'a resident of the State, district, county or township in which the duties of his office are to be exercised or for which he may have been elected'—it being their contention that the term 'district,' as here employed, is sufficiently broad to include the territorial division of a city usually designated as a 'ward,' and that therefore the defendant's office as alderman became vacant upon his removal from the ward from which he was elected. The word district is often used in the statutes of this State, but so far as I have been able to discover always in a specific sense relating to some designated territorial division, rather than generally and with reference to undefined divisions of the territory of the State, or divisions which are also described by other well rec-

State *ex rel.* Hartford v. Craig,[8] was decided in May, 1892, and McBride, C. J., says, in his opinion, "no authority is cited and counsel present the case as one of first impression."

The Indiana statute provided that two aldermen shall be elected from each ward by the legal voters of the respective wards, and also "no person shall hold the office of councilman unless at the time of his election he is a resident of the ward from which he is elected, and in case of the removal of any councilman from the ward in which he was elected, the common council shall have power to declare his office vacant and order a special election to fill the vacancy." The council took no action. *Quo warranto* proceedings were instituted. The only question was whether the defendant's removal from his ward vacated his office. The court below held it did not. The Supreme Court held that the legislature "may, without doubt, as is done in the statute now under consideration, prescribe that only those shall be eligible for election as councilmen, who are at the time residents of the ward for which they are elected. We think it equally clear that it may provide that removal from that ward will of itself operate as a vacation of the office. We do not think, however, that it has done so. In our opinion, it has only committed to the city council the power to declare a vacancy in such a case, but it has also left the exercise of such power to the discretion of the council. Until that body has acted, the mere fact of removal to another ward will not of itself have the effect to create a vacancy, * * * the member of the city council when he takes his oath of office, assumes duties and a jurisdiction co-extensive with the limits of the city. He is not an officer of the ward, but an officer of the entire city." Judgment was affirmed. The reasoning of this case was adopted and followed by Judge Smyth.

While it is the only decision of a court of last resort upon the question, there is the report of a case decided in the court of common pleas of Northampton County, Penn.,[9] in October, 1893, in which the learned judge took the opposite view. In this case the question was whether respondent having been a regularly elected member of the town council of the borough of Bethlehem from the first ward, and having removed from the ward but still remaining a citizen of the borough, such removal created a vacancy, or whether he was entitled to serve out the term for which he was elected, notwithstanding his removal. The judge, in his opinion, construing the Pennsylvania statute which made each ward an election district, and provided that the electors of each ward should elect councilmen and school directors, and that school directors should be residents of the ward from

ognized names or designations. Thus we have congressional, judicial and legislative districts, also school and road districts and perhaps in some cases election districts, but all so defined by the statute that the meaning of the term seems plainly restricted to such political or territorial divisions as are designated by it in the statute. I know of no express statutory reference to a ward of a city as a district and in my judgment the term in its legal sense cannot be so broadened that the reference to districts in the statute under consideration can be held to apply to wards of cities. It was evidently the purpose of the statute prescribing the manner of electing aldermen, before cited, that they should be chosen from different parts of the city in order, doubtless, that the wants and interests of all the citizens might be known and considered by the common council, but I am unable to adopt the view that each ward is a separate and independent power or province entitled to representation in the city council as such. On the contrary it seems that the territorial subdivision into wards is effected only for the purpose of more conveniently and satisfactorily administering the affairs of the whole city, which is itself a single corporation having certain governmental functions but none of which can be exercised by it otherwise than as an entirety. It follows therefore that when a citizen, having the proper qualifications is elected to the office of alderman, and takes the oath of office as such, he becomes an officer not of the ward that has chosen him but of the whole city, with duties and responsibilities not confined within the boundaries of his own ward, but co-extensive with the limits of the city at large. State v. Craig, 31 N. E. Rep. 352. Whether it was thought by the framers of the statutes bearing upon this subject that a sufficient diversity of interest among the members of the city council would be insured by the provision that the electors of each ward should elect two aldermen, at the time resident electors of the ward, or it was the real intention of the makers of the law to provide that the qualifications prescribed for aldermen at the time of their election should continue during their incumbency and this provision was omitted by inadvertence, is now a fruitless inquiry, as we can be guided only by the language of the statute as it is written. It is possible that it would be better policy or more convenient that no alderman should be permitted to continue in office as such, after removing his residence from the ward which had elected him, but it does not appear to me that there is any statute of the State or ordinance of the city prescribing such a restriction, and it is my opinion that the court ought not to forcibly oust any citizen from an office to which he has been lawfully elected, without plain statutory authority, either by express language or necessary implication, warranting such action.

[8] *Supra.*

[9] Commonwealth v. Yeakel, 13 Co. Court Rep. 615.

which elected, held: "this section specifically requires that school directors elected from each ward shall be residents of said ward, and although there is no similar provision relating to members of council, yet this section may be regarded as confirming the idea that the legislature intended to provide for ward representation strictly. It seems to us that it is clearly the purpose of the law that councilmen should represent ward constituencies, and as a corollary to this provision it would follow that they must be residents of the ward which they represent. The policy of the law has ever been that those who are to be electors of any district or municipal subdivision, to fill the representative offices confined to those districts, shall be themselves electors of those districts. It is clearly the policy of law as well as the legislative intent, to give to each ward in a municipal legislative body, equal representation from among the residents of that ward in order that there may be no unjust discrimination in either legislation or appropriation against any of the several wards constituting the entire borough. If this is true, then when a councilman divests himself of citizenship in any ward he divests himself of office. Were it not so instead of having the condition which is clearly the legislative purpose to maintain, we might have, by a series of removals, every member of the council living in one and the same ward, leaving every other ward in the municipality without representation."

The learned judge seems to have based his opinion on the theory of democratic local self-government, and not upon any recognized rule of statutory construction, certainly not upon that recognized by his own Supreme Court. However, the report which gives the authority cited by counsel for respondent, reveals the fact that the court did not have the aid of Hartford *ex rel.* v. Craig,[10] decided only eighteen months before.

On the other hand, Commonwealth *ex rel.* v. Yeakel,[11] cited to Judge Smyth in State *ex rel.* v. Moore,[12] was considered by him and its conclusion rejected. The reasoning of the case certainly does not commend itself to the legal mind. The Supreme Court of Illinois construed a charter which provided that the board of aldermen should consist of two members from each ward, and held that a person resident in one ward might be elected from another.[13] The Indiana court and Judge Smyth undoubtedly applied the proper rules of statutory construction, and arrived at a correct conclusion. Indeed, I believe there is nothing in the Iowa statute which would vacate the office of a duly elected and qualified alderman, by reason of his subsequent removal from the municipality, but within the county, or as the Pennsylvania judge suggests, that after their election from their respective wards, from which they were residents and qualified electors at the time of their election and their qualification, all the aldermen might move into one ward.

GEORGE B. STEWART.

Fort Madison, Iowa.

[10] *Supra.*
[11] *Supra.*
[12] *Supra.*

[13] Jones v. Mills, 11 Ill. 350. This case seems opposed to the Pennsylvania theory of self-government.

DURESS OF GOODS—WHAT CONSTITUTES.

FULLER V. ROBERTS.

Supreme Court of Florida, January 15, 1895.

1. Duress may consist of one's goods as well as of his person.

2. Duress of goods may exist where one is compelled to submit to an illegal exaction in order to obtain his goods from one who has them, but refuses to surrender them unless the exaction is endured.

3. Legal duress implies that a party has been unlawfully constrained by another to perform an act under circumstances which prevent the exercise of free will. The act of the party compelling the unwilling obedience of another must be unlawful or wrongful, and there can be no duress of goods in law where the act done or threatened is nothing more than what the party had a legal right to do.

MABRY, C. J.: The proceedings in this case were commenced by appellee filing a bill against appellants to foreclose a mortgage on property situated in Hillsborough county, in this State. The mortgage sought to be foreclosed was executed by appellants, and conveyed the property therein described to appellee upon the condition that appellants should pay unto appellee, his executors, administrators, or assigns, the just and full sum of $1,000, with interest after maturity, evidenced by a promissory note executed by appellants to appellee, and upon the further condition that appellants should well and truly pay and discharge all debts and liabilities of Henry W. Fuller and appellee, as copartners doing business under the firm name and style of Fuller & Roberts, and all debts and liabilities of Henry A. Fuller, Henry W. Fuller, and appellee, doing

business in the firm name of H. A. Fuller, and also indemnify and save harmless appellee from all notes, debts, or demands, of whatever nature, for the payment of which he had become, or might become, liable on account of his said business connection with appellants or either of them. There were covenants as to insuring the property mortgaged, and as to paying attorney's fees in the event of foreclosure, not necessary to be mentioned.

Appellants answered the bill, and alleged, in substance, that on the 1st day of October, 1887, appellee and Henry W. Fuller entered into a partnership under the firm name and style of Fuller & Roberts, appellee putting into the business $4,400, and becoming a full and equal partner, entitled to one-half of the profits, and liable for one-half of the losses, and that he had charge of the books and office work of the business, and made personally, or supervised the making of, all entries in said books; that said business, by reason of depression caused by yellow fever and losses in purchasing oranges, became insolvent in April, 1888, the nominal assets at that time amounting to $32,000, and the liabilities to $30,000; and appellee and Henry W. Fuller, being indebted to Henry A. Fuller in the sum of $12,000 for money advanced and liabilities assumed and guarantied by him, sold to him the stock of goods and merchandise, amounting to $14,495.48, in payment of the indebtedness to him, his intention being to pay up all indebtedness of said firm, and protect the creditors thereof; that at the time of said sale it was agreed between appellee and appellants that Henry W. Fuller and John B. Roberts should give their time, attention, and services to the business to be carried on in the name of H. A. Fuller, in return for which they were to receive one-third of the profits, if any, and bear one-third of the losses, if any, and that the office of said business, and the books belonging thereto, were in charge of appellee, Roberts; that about April 9, 1889, appellee found the business was losing money, and demanded a settlement and winding up thereof instanter, and appellants told him to wait until the end of the month, when they would take stock and settle with him; that appellee apparently agreed to this, but appellants believe, and so charge, that he never intended to have the settlement, and he was at that time in consultation with counsel in reference to instituting proceedings which he afterwards did institute; that on the 20th of April, 1889, he filed his bill asking for a dissolution of the partnership, and also praying for an injunction to restrain appellants from interfering with said business, and for the appointment of a receiver to take charge of the same, setting up in said bill, as grounds for the relief prayed, that appellants had made false entries in the books in order to defraud appellee, and that said business had made large profits and was indebted to him in the sum of $3,000, and other grounds; that the bill was presented to the chancellor without notice to appellants, and the injunction was granted, and a receiver appointed to take charge of said business; that the statements in the bill were false and untrue, and appellee well knew them so to be at the time he filed the bill, and he knew that within a few days after the filing of his bill there would fall due certain notes and acceptances of the firm of H. A. Fuller, and the firm of Fuller & Roberts, to the amount of $3,000, and that if they were not paid the business would be compelled to fail; and appellants believe, and so charge, that appellee, knowing these facts, instituted his said proceedings for the purpose of defrauding and cheating them and the creditors of said firms; that appellants went to appellee, and informed him that they were willing to make any settlement with him possible, and offered to give good and sufficient surety for any amount that might be found due him upon an examination of the books by any competent book-keeper that he might select, but that appellee replied that he knew there was due him the sum of $3,000, and that he would do nothing unless that amount was paid him; that appellants being in the position they were, and knowing that if said business continued in the hands of a receiver, until settlement could be reached there would be entailed upon the business a large loss, as it was at that time barely solvent, and its assets could only by judicious management be made to meet its liabilities, and, if the receivership continued, not only would appellants lose, but the creditors would suffer; that being so situated, and in order to save the creditors of the firm and themselves, appellants gave to appellee their promissory note for $1,000, payable six months after date, and assumed the liabilities of the firm of Fuller & Roberts, and in order to secure the payment of said note, and the liabilities of said firm, they executed the mortgage mentioned in the bill of complaint; that afterwards, upon examination of the books of the business of H. A. Fuller, and which had all the time been under the control of appellee, it was found that said business had lost the sum of $3,000, of which appellee was responsible for $1,000, and that he was entitled to nothing at the time appellants executed to him the said note for $1,000, and the mortgage to secure the same, and he was largely indebted to said business; and, further, appellants say that said note was given under duress, and under a mistake as to the true *status* of said business, and was without consideration. Exceptions were sustained to the answer, and the defendants therein declining to further answer, *decree pro confesso* and final were regularly entered, and the case is before us on appeal from all the decree.

The only question presented here relates to the ruling of the court sustaining the exceptions to the answer, and, as this ruling was before the *decree pro confesso* was entered, the action of the court in the particular mentioned is fully open for investigation. Garvin v. Watkins, 29 Fla. 151,

10 South. Rep. 818. The sole contention here on behalf of appellants is that the note was executed under duress. It is further stated in the answer that the note was executed under a mistake as to the true *status* of the said business, and was without any consideration; but it is not averred that appellants did not have free access to the books of the copartnership, and did not have it in their power to inform themselves of the true *status* of affairs before giving the note. Sheldon v. School-Dist., 24 Conn. 88. The allegation that appellee kept the books and had charge of the office work of the business does not imply that the other partners did not have a full opportunity of obtaining all information they desired in reference to the *status* of the business. We confine ourselves to the point presented, which is that the note was executed under duress. From the recitals in the mortgage, made a part of the bill of complaint, and the answer, it sufficiently appears that appellants executed the note and mortgage to appellee in settlement and adjustment of an interest claimed by him in a partnership business in which they had been engaged. The answer alleges that appellee claimed $3,000 as due him from the partnership business in which it is made to appear he was interested as a partner, but that he accepted the note secured by mortgage for $1,000. It is also made to appear that the note and mortgage were executed after appellee had filed his bill to dissolve the partnership and had secured the issuance of an injunction against appellants, and the appointment of a receiver to take charge of the partnership business. It is the settled general rule that, if one compromises a demand after action brought on it against him by paying it in whole or in part, he cannot, in a subsequent action, recover back the money paid, upon any ground available to him as a defense to the original action. This rule rests upon the sound principle that there should be an end of litigation, and it has been generally applied by the courts. Marriot v. Hampton, 3 Smith, Lead. Cas. 1686, and notes; *Id.*, 7 Term R. 269, 2 Esp. 546, 4 Rev. Reports, 439; Adams v. Reeves, 68 N. C. 134.

This general rule is subject, however, to qualifications. The process of the law must be *bona fide* sued out, and not accompanied by circumstances which amount to duress or extortion. In Adams v. Reeves, *supra*, it is said: "If one knowing that he has no claim upon another, sues out legal process against him, and seizes his person or property, and the defendant, acting upon the false representations of the plaintiff, and not being able at the time, by reasonable diligence, to know or to prove that such representations are false, pays the demand, he may recover it back in a subsequent action." It is upon this ground that appellants rest their defense in the present case. It is not alleged or claimed that there was any duress of the person, but it is insisted that there was a duress of goods; hence that character of duress only is considered. There is no doubt but that there may be such a thing as duress of goods. In the case of Collins v. Westbury, 2 Bay, 211, it is said: "So cautiously does the law watch over all contracts, that it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or refuse such contracts; and that not only with respect to their persons, but in regard to their goods and chattels also." Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them, but refuses to surrender them unless the exaction is endured. This is the definition of "duress of goods" given by Judge Cooley in Hackley v. Headley, 45 Mich. 569, 8 N. W. Rep. 511. In Cobb v. Charter, 32 Conn. 358, it was held that whenever money is paid under a necessity to obtain possession of goods illegally withheld, and where the detention is fraught with great immediate hardship or irreparable injury, the payment is compulsory, and the money so paid may be recovered back in an action of *assumpsit*. A pawnbroker refused to deliver goods held by him in pawn until he was paid unjust and excessive interest. The owner paid the demand made on him in order to obtain possession of his property, and was permitted to recover back the excess. Astley v. Reynolds, 2 Strange, 915. The authorities are abundant in support of the proposition that where a party has possession or control of the goods of another, and refuses to surrender them except upon compliance with an unlawful demand, and there is no other speedy way left the owner of extricating them, and saving himself from irreparable injury, but by paying money or giving a note, his doing so will be regarded as done under compulsion. Thurman v. Burt, 53 Ill. 129; Spaids v. Barrett, 57 Ill. 289; Vyne v. Glenn, 41 Mich. 112, 1 N. W. Rep. 997; Beckwith v. Frisbie, 32 Vt. 559; Harmony v. Bingham, 12 N. Y. 99; Chamberlain v. Reed, 13 Me. 357; Adams v. Schiffer, 11 Colo. 15, 17 Pac. Rep. 21. And so the payment of money by a person to free his goods from an attachment sued out for the purpose of extortion, by one who knows that he has no valid cause of action, has been held to be under duress. Chandler v. Sanger, 114 Mass. 364; Collins v. Westbury, 2 Bay, 211; Adams v. Reeves, 68 N. C. 134; Spaids v. Barrett, *supra*.

In his work on Torts (page 507) Judge Cooley says: "Duress of goods consists in seizing by force or withholding from the party entitled to it the possession of personal property, and extorting something as the condition for its release, or in demanding and taking personal property under color of legal authority, which, in fact, is either void or, for some other reason, does not justify the demand." Legal duress implies that a party has been unlawfully constrained by another to perform an act under circumstances which prevent the exercise of free will. The act of the party compelling the unwilling obedience of another must be unlawful or wrongful, and there can be no duress of goods in law where the

act done or threatened is nothing more than what the party had a legal right to do. Hackley v. Headley, *supra;* Wilcox v. Howland, 23 Pick. 167. We do not think the facts stated in the answer of appellants make a defense upon the ground of duress of goods, within the principles of law applicable to that subject. The answer, taken in connection with the mortgage, the execution of which is admitted, shows a settlement between partners in which one was to have a certain sum of money in lieu of an interest claimed in the business, and a guaranty on the part of the others to save him harmless from any partnership liability. The note for $1,000 represents the amount to be paid in money, and the mortgage contains the agreement as to the guarantee against partnership liability. The purpose of the suit instituted by appellee against appellants was, as shown by the answer, to dissolve and wind up a partnership then existing between the parties, and for this purpose to place the partnership property in the hands of a receiver. By executing the note and mortgage, appellants secured to themselves complete control of the business in which it is admitted appellee was interested as a partner, and he thereby parted with the right to ever have a partnership settlement as between him and his former associates. The answer alleges that the note was executed under duress, but no such allegation is made in reference to the mortgage, and the certificate of acknowledgment attached thereto, made by a notary public, recites that appellants acknowledged the execution of the mortgage as their free act and deed and for the purposes therein mentioned. The note and mortgage show the terms of settlement or compromise, between the parties, and are parts of one and the same transaction. If appellee, through the means of legal procedure, caused appellants' goods to be taken from their custody when he knew that he had no cause for such action, and they had no speedy way of saving their property from serious loss except by giving a note and mortgage, they would have a good defense thereto, within the principle of the authorities above cited. But we do not see that such is the case presented by the record before us. The answer does allege substantially, that appellee filed a bill asking for the dissolution of an existing partnership, praying for an injunction and the appointment of a receiver to take charge of the business, and setting up as grounds for the relief prayed that appellants had made false entries in the partnership books, and the business had made large profits, and other grounds; that the statements in the bill were false and untrue, and were well known to appellee so to be when he filed the bill, and that he knew certain notes and acceptances of the partnerships would fall due within a few days thereafter, and, if not paid, the business would have to fail; and appellants believed, and so charged, that appellee, knowing the facts, instituted his proceedings for the purpose of defrauding and cheating appellants and the creditors of said firms. The other grounds contained in appellee's bill are not stated. It is doubtful whether appellants intended to allege in their answer that any other statements in appellee's bill were false and known to him to be such, except those in reference to the profits of the business and the false entries in the books, upon which the special relief was based: but, if it be conceded that the answer is to have a broader meaning, it is apparent that it contains other allegations affording sufficient grounds for a *bona fide* resort to a court of equity for the purpose of dissolving the partnership and having its affairs settled up. The partnership existing at the time was at will, no time appearing to have been fixed for its continuance, and appellee demanded a settlement, which was not acceded to. Story, Partn. § 269. As appears from what is stated in the answer, the business had been unprofitable, and was then losing money, and it appears there was sufficient foundation for appellee to exercise a legal right in asking a court of Equity to take jurisdiction of the subject-matter of the suit. The foundation for a resort to the court is disclosed by the answer itself. Whether the bill was technically correct, or sufficient in all its allegations, does not now concern us, as facts are shown to exist which afforded grounds for invoking the exercise of an undoubted jurisdiction of the court in winding up a partnership transaction in which all the parties were interested, and as to which a disagreement existed between them. If the resort to the court on the part of appellee to dissolve and wind up the partnership business was the exercise of a legal right, then there was no such wrongful act on his part as to put the appellants under a duress of goods. The allegation in the answer that the note was executed under duress must be considered as a conclusion from the facts alleged, and, as stated, the note and mortgage containing the agreement of indemnity against partnership liability were executed in compromise of appellee's claim of interest to the extent of $3,000 in the partnership business. Appellants cannot reap the benefits of a part of the settlement by holding on to the partnership business, and repudiate another part by insisting that it was entered into under duress.

The case presented by the answer is not one, as insisted by counsel for appellants, where a party knowing that he had no cause of action resorted to legal proceedings for the purpose of seizing the property of another, and thereby extorting money or other thing of value from the owner in order to get the property released, but, as shown by the answer itself, there was sufficient basis of right in the appellee in this case to resort to the court of equity for an adjustment of the partner ship affairs between him and his associates.

We think the court decided correctly in sustaining the exceptions to the answer of appellants, and the result is that the decree must be affirmed; and it is so ordered.

NOTE.—Upon the general proposition that duress of goods may exist where one is compelled to submit to an illegal exaction in order to obtain his goods from one who has them but refuses to surrender them unless the exaction is endured, see, in addition to the cases cited in the opinion above: Mays v. City of Cincinnati, 1 Ohio St. 268; Fashay v. Ferguson, 5 Hill (N. Y.), 154; Briggs v. Boyd, 56 N. Y. 289; Peyser v. Mayor, 70 N. Y. 497, 26 Am. Rep. 624; White v. Heylman, 34 Pa. St. 142; Miller v. Miller, 68 Pa. St. 493; Central Bank v. Copeland, 18 Md. 305; Baltimore v. Lefferman, 4 Gill (Mo.), 425; Nelson v. Suddarth, 1 Hen. & M. (Va.) 350; Adams v. Reeves, 68 N. C. 134; Sasportas v. Jennings, 1 Bay (S. C.), 470; Collins v. Westbury, 2 Bay (S. C.), 211; Crawford v. Cato, 22 Ga. 594; Buemagin v. Tillinghast, 18 Cal. 266; Adams v. Schiffer (Colo.), 17 Pac. Rep. Rep. 21; Radich v. Hutchins, 95 U. S. 210; United States v. Huckabee, 16 Wall. 414.

The leading American case on this subject is, without doubt, Hackley v. Headley, 45 Mich. 569, in which there is a very able and exhaustive opinion by Mr. Justice Cooley. There the duress complained of consisted, in effect, of the refusal of the debtors to pay a sum justly due, and the offer of a less sum in full settlement, although they were informed that the plaintiff was in great need of money, had made no other arrangement to obtain it, and although he might be financially ruined in case he failed to obtain it. Said the court, after adopting the definition of duress of goods given in the principal case: "The leading case involving duress of goods is Atley v. Reynolds, 2 Strange, 915. The plaintiff had pledged the goods for £20 and when he offered to redeem them the pawnbroker refused to redeem them unless he was paid £10 for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken." This, say the court, "is a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business; where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not; we must take it that he paid the money relying on his legal remedy to get it back again." The principle of this case was approved in Smith v. Bromley, Doug. 696, and also in Ashmole v. Wainwright, 2 Q. B. 837. The latter was a suit to recover excessive charges paid to common carriers who refused until payment was made to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances. Harmony v. Bingham, 12 N. Y. 99. The case is like that of one having securities in his hands which he refuses to surrender until illegal commissions are paid. Scholey v. Mumford, 60 N. Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft he may recover back what he pays. Chase v. Dwinal, 7 Me. 134. Other cases in support of the same principle are Shaw v. Woodcock, 7 B. & C. 73; Nelson v. Suddarth, 1 H. Munf. 350; White v. Heylman, 34 Pa. St. 142; Sasportas v. Jennings, 1 Bay, 470; Collins v. Westbury, 2 Bay, 211; Crawford v. Cato, 22 Ga. 594. So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action. Chandler v. Sanger, 114 Mass. 364. See Spaids v. Barrett, 57 Ill. 289. Nor is the principle confined to payments made to recover goods; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example, when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to (Bates v. Insurance Co., 3 Johns. Cas. 238), or a creditor withholds his certificate from a bankrupt. Smith v. Bromley, Doug. 696. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it. Beckwith v. Frisbie, 32 Vt. 559; Adams v. Reeves, 68 N. C. 134; Briggs v. Lewiston, 29 Me. 472; Grim v. School District, 57 Pa. St. 433; First Nat. Bank v. Watkins, 21 Mich. 483.

But where the party threatens nothing but what he has a legal right to perform, there is no duress. Skeate v. Beale, 11 Ad. & El. 983; Preston v. Boston, 12 Pick. 14. When therefore a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount with sureties, the note cannot be avoided for duress. Wilcox v. Howland, 23 Pick. 167.

CORRESPONDENCE.

PROVISIONS OF DEFAULT IN MORTGAGE—A CRITICISM.

To the Editor of the Central Law Journal:

The leading article by Honorable Samuel Maxwell, Ex-Chief Justice of the State of Nebraska, in your issue of June 21st, concerning provisions in a mortgage that the whole debt may be declared due upon default in payment of an installment, has attracted much attention in this State and caused considerable comment, not by reason of the rules of law announced, for in that respect the article succinctly collates the authorities upon a minor and rather well worn rule of law; but the distinguished jurist in the article named, after showing that by the uniform holding of the courts for 100 years, a provision in a mortgage that the whole debt may be declared due upon default in payment of interest, is not in the nature of a penalty, but will be enforced according to its terms, argues that the rule should now be overturned, the line of decisions cited by him overruled, and that by judicial construction it should hereafter be the law that such provisions should be regarded as penalties, and not enforcible in the courts. It is noticible that the suggestion is not made to the legislature, but seems to imply that the courts themselves should overthrow the established law by some new judicial revelation. However much the honored ex-chief justice of this State may be convinced of the soundness of his views in this particular, his opinion is not shared by the present judiciary of this State. In Morling v. Bronson, 37 Neb. 608, such a provision was fully considered and discussed, and was held not to be in the nature of a penalty, but enforcible according to its terms. The court says: "On what principle can this court say that one of the conditions of the written contract is a nullity, or is not enforcible, and hold that although defendant has made voluntary default, yet the consequences, solemnly agreed to in writing by him, shall not be permitted to follow. This provision, in the absence of a showing of fraud, want of consideration, or illegality in the transaction, is a valid provision. Courts can only enforce a contract as made. They do not sit to make contracts for parties, or relieve them of the consequences of a breach of their agreement. It is not for us to inquire into the purposes of the parties in introducing a condition into the note, or to express the opinion that in this respect the contract

was a harsh or unfair one." So in the recent case of Havemeyer v. Paul, decided June 18th, and not yet reported, the Supreme Court of Nebraska, overruling a former decision of Chief Justice Maxwell in Richardson v. Campbell, 34 Neb. 181, decides that where a note provides for interest at six per cent. per annum before maturity, and if not paid at maturity, ten per cent. per annum after maturity, the provision for an increased rate of interest upon default is not in the nature of a penalty, but is to be regarded as a contract rate for the use of the money, and will be enforced. There is no likelihood whatever that the Supreme Court of Nebraska will recede from its positions on these questions. If this were a mere difference of opinion between lawyers over a minor point of law, it would not be of sufficient importance to occupy the public prints. But the fact is that Judge Maxwell's utterances through the columns of the CENTRAL LAW JOURNAL, is the last expiring echo of a contest which has raged fiercely in these western States during the past five years. After the period of inflation, and real estate speculation, which took place during the decade ending about the year 1890, it was found that there were a large number of real estate mortgages upon western lands held by eastern investors, mostly in default and foreclosure threatened. The legislature and the courts were implored to ward off the undoubted evils which would follow the immediate enforcement of mortgage liens, by adopting some system of repudiation. Some of the western States enacted laws designed for that purpose, and are now suffering the bitter consequences which always follow the repudiation of a debt. No such legislation has ever obtained in Nebraska, although serious efforts were made to bring it about. That the spirit of repudiation found no lodgment in our judicial tribunals, may be seen from the two cases cited above, and that fact may be better appreciated when it is understood that both opinions were prepared by the only populist member of the Supreme Court. It is not my purpose to enter into a discussion of the merits involved in the proposition of the venerable exchief justice to overturn the decisions of a century, nor would it serve any purpose to point out that the greatest injury resulting from his plan would fall upon the unfortunate debtors themselves. A single instance may be cited. There is now pending in this city a proceeding in one of our courts to foreclose a mortgage of four million dollars given by one of the corporations holding a public franchise in a Nebraska city, to secure a number of bonds of small denominations, which were to run twenty years if the interest were paid semi-annually, but could be declared due upon the default in the payment of any installment of interest. If that provision should be held a penalty, then for a period of twenty years, the corporation which had borrowed the money could retain the use of it without paying interest, and at the expiration of the twenty years the accumulated and dishonored interest would amount to as much as the original debt. Can it be for one moment supposed that loans of that character, absolutely necessary for the development of the western country, can be floated in any money market, in the face of a decision that held the provision in question non-enforcible?

Omaha, Neb. FRANCIS A. BROGAN.

JETSAM AND FLOTSAM.

OFFER AND ACCEPTANCE.

The New York Court of Appeals last December divided almost evenly on a question of some interest to the business community. Two parties had been exchanging letters with a view to an agreement, and finally one made an offer, definite in all its terms, and added, "If satisfactory, answer, and I will forward contract." The reply was, "All right; send contract." When the contract was sent, the other party refused to sign it. A bare majority of the court held that there was a contract. Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209.

It seems to be well settled, as the cases collected in 40 Cent. L. J. 92, show, that the mere fact that parties wish to have a formal agreement drawn up will not prevent their being bound by a previous agreement, if it is clear that such an agreement has been made. Bonnewell v. Jenkins, 8 Ch. D. 70; Bell v. Offutt, 10 Bush (Ky.), 632; Blaney v. Hoke, 14 Ohio St. 292; Mackey v. Mackey, 29 Gratt. 158; Cheney v. Eastern Trans. Line, 59 Md. 557; Paige v. Fullerton, 27 Vt. 485; Chinnock v. Marchioness of Ely, 1 De G. J. & S. 638; Winn v. Bull, Ch. D. 29, 32. On the other hand, if the acceptance is made subject to a written agreement, or if the terms of the bargain are not definitely settled, there is no contract, and in all cases the fact that a subsequent agreement is to be drawn up is cogent, although not conclusive, evidence that the parties do not intend to be bound. Ridgway v. Wharton, 6 H. L. C. 238; Winn v. Bull, 7 Ch. D. 29. But when there is a definite proposal, definitely assented to, and when the acceptance is not expressly made subject to a future agreement, it seems more reasonable to suppose that the parties intend the very terms agreed upon to be put into form, than that they intend them to be subject to a future agreement, the terms of which are not expressed in detail. There is in such a case little more than the mere fact that a future agreement is to be drawn up, and that, as already stated, is not enough. A definite offer, accepted in terms, in most cases enough to make a contract, and, according to the opinion of the majority, it makes one in this case. The contract is to sell goods and to sign a written paper as evidence, and because one of the parties refuses to sign the paper, *non sequitur* that the other may not prove the contract by other legal evidence.

The New York court divided in the same way on the same question in 1860. Pratt v. The Hudson River R. R., 21 N. Y. 305.—*Harvard Law Review.*

BOOK REVIEWS.

PATTISON'S LATE MISSOURI DIGEST, Vol. 2.

We took occasion in a late issue of this JOURNAL (Vol. 40, p. 499), to make favorable mention of this supplementary Missouri digest. This, the second volume, has just made its appearance and differs in no respect from the first. We feel sure that Missouri practitioners will commend the work of Mr. Pattison in these volumes. Published by the Gilbert Book Company, St. Louis.

CLARK'S CRIMINAL PROCEDURE.

We have taken occasion heretofore to speak favorably of the Handbook series of text books, and the excellence of the style and manner of their preparation. The present is one of the best of that series, and though purporting to be but a handbook is exceedingly full, comprehensive and complete. It is well written and exhaustively annotated. It is a handsome volume of seven hundred pages. Published by West Publishing Co., St. Paul.

BOOKS RECEIVED.

Commentaries on the Law of Private Corporations. By Seymour D. Thompson, LL.D. In Six Volumes. Volume IV. San Francisco: Bancroft-Whitney Company. 1895.

HUMORS OF THE LAW.

The most popular man in a western town had got into a difficulty with a disreputable tough who was the terror of the place, and had done him up in a manner eminently satisfactory to the entire community. It was necessary to vindicate the majesty of the law, however, and the offender was brought up for trial on a charge of assault with intent to kill. The jury took the case and were out about two minutes, when they returned.

"Well," said the old judge in a familiar, off-hand way, "what does the jury have to say?"

"May it please the court," responded the foreman, "we, the jury, find that the prisoner is not guilty of hittin' with intent to kill, but simply to paralyze, and he done it."

A coroner's jury, after listening attentively to the evidence given in a case of suicide, brought in the following sage verdict: "We are of the opinion that the want of the common necessaries of life drove the deceased to commit the desperate act with the greatest deliberation; therefore we find him guilty of culpable insanity."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT — Garnishment as a Defense. — In an action on account by an assignee thereof, where the defense was that defendant had been garnished in an action against the assignor, and judgment for the amount of the account taken against him, which he had paid, an answer which failed to allege that a writ of attachment issued in the action against the assignor, and that judgment was rendered against him therein, was insufficient.—ALBERTS v. BAKER, Ind., 40 N. E. Rep. 1119.

2. ACTION BY HEIRS.—In an action by heirs to collect a judgment due to their ancestor, a complaint which failed to allege that there was no administration of the estate, and that there were no debts of the deceased to pay, is bad on motion in arrest of judgment.—LOCKHART v. SCHLOTTENBACK, Ind., 40 N. E. Rep. 1109.

3. ACCOUNTING ON OFFICIAL BOND. — Where a court of equity has jurisdiction of a bill for account against the principal on a bond or his representatives the sureties on the bond can properly be made parties for the purpose of the accounting but no decree for payment can be made against them. — MAYOR, ETC., OF BOROUGH OF RUTHERFORD v. ALYED, N. J., 32 Atl. Rep. 70.

4. ADVERSE POSSESSION—Tax Deed.—The purchaser of land sold for taxes, who actually occupies the same adversely for three years, under an auditor's deed, after one year from the date of sale although the sale was defective, has, under Code 1880, § 539, a perfect title.—BROUGHER v. STONE, Miss., 17 South. Rep. 509.

5. AGENCY—Evidence.—The authority of one to bind another by contracting in his name cannot be shown by the declarations of the alleged agent alone.—WESTERN INDUSTRIAL CO. v. CHANDLER, Tex., 31 S. W. Rep. 314.

6. APPEAL — Jurisdiction.—In an action for a penalty provided by ordinance, the validity of the ordinance is not "duly presented," so as to bring it within the appellate jurisdiction of the Supreme Court, merely because in the Circuit Court, on appeal from the city court, where action was brought, a demurrer to the answer, alleging the invalidity of the ordinance, was sustained, as in the Circuit Court, on appeal from the city court, matters of defense are admissible without plea as in the city court.—BERKEY v. CITY OF ELKHART, Ind., 40 N. E. Rep. 1081.

7. APPEAL—Record.—Burns' Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410), providing that the original long-hand manuscript of the evidence may be certified up to the Supreme Court after being filed and incorporated in a bill of exceptions, does not authorize the original bill to be certified up, where, in addition to the evidence, such bill includes instructions given and refused, and the exceptions thereto; and, if so certified, it will be disregarded.—HOLT v. ROCKHILL, Ind., 40 N. E. Rep. 1090.

8. ARBITRATION — Withdrawal from Agreement.—Either party may withdraw from an agreement to arbitrate made after a cause of action has arisen, and before the award has been rendered; such an agreement being no bar to suit at law or in equity, and no foundation for a decree of specific performance, the only remedy being an action for damages growing out of the breach of submission.—RISON v. MOON, Va., 22 S. E. Rep. 165.

9. ATTACHMENT—Attachable Funds.—A will directed the sale of property and the investment of the proceeds, and directed that the interest thereon should be paid to a certain son semi-annually during his life, and that on his death the fund should be divided among testator's other children: Held, that the interest money was attachable by the son's creditors.—BREMER v. MOHN, Penn., 32 Atl. Rep. 90.

10. ATTACHMENT — Public Improvement. — Under a statute, which purports to give to a municipality an action upon contract against a lot owner, to recover the expense of laying a sidewalk in front of his property, an attachment is an appropriate process against a non resident owner. —STATE v. MAYOR, ETC., OF BOROUGH OF SPRING LAKE, N. J., 32 Atl. Rep. 77.

11. ATTACHMENT — Rights of Foreign Assignee.—The claim of an attaching creditor, a citizen of New Jersey, will be preferred to that of the assignee, a resident of another State, who claims under an assignment for the

benefit of creditors, and consequently to one who claims under such assignee by virtue of a *bona fide* purchase subsequent to the levying of the attachment.—HUGHES V. LAMBERTVILLE ELECTRIC LIGHT, HEAT & POWER CO., N. J., 32 Atl. Rep. 69.

12. ATTORNEY AND CLIENT—Authority of Attorney.—An attorney, without express authority from his client, has no power to bind the latter by a compromise judgment in a litigated suit for less than the amount demanded.—SENN V. JOSEPH, Ala., 17 South. Rep. 543.

13. CARRIER — Shipment of Live Stock.—Stipulations in a contract for an interstate shipment, limiting the carrier's liability, must be reasonable, and a stipulation, requiring notice of a claim for damages to be given before the removal of the shipment from the station, is, as applied to injuries to horses caused by the burning of the car in which they were shipped, *prima facie* unreasonable, it not being probable that the full amount of damage to the horses would be immediately disclosed.—HOUSTON & T. C. R. CO. V. DAVIS, Tex., 31 S. W. Rep. 308.

14. CARRIERS OF GOODS — Express Company.—In an action against an express company for damage caused by the delay in the delivery of samples of cotton in the market where plaintiff wished to sell, it is error to exclude evidence that the bulk of the cotton was inferior to the samples, and that plaintiff received more therefor than it was worth in the market to which the samples were shipped.—WELLS FARGO EXP. CO. V. SAMUELS, Tex., 31 S. W. Rep. 305.

15. CARRIERS OF PASSENGERS—Expulsion of Passenger —Damages.—The extent of the injury of a passenger who has been wrongfully expelled from a railroad train, and the amount of damages recoverable, do not depend at all upon the intentions or good faith of the conductor in executing a rule of the company, but only upon what was done and the consequent injury. — PITTSBURGH, C., C. & ST. L. RY. CO. V. RUSS, U. S. C. C. of App., 67 Fed. Rep. 662.

16. CONFLICT OF LAWS—Presumption. — Where there is no proof of the law of another State, nor judicial knowledge of the origin of such State, which would raise a presumption that the common law prevails there, it will be presumed that the law of the forum is the law of such State on the question under consideration.—KENNEBREW V. SOUTHERN AUTOMATIC ELECTRIC SHOCK MACH. CO., Ala., 17 South. Rep. 545.

17. CONSPIRACY—Amendment.—Where several persons are sued as co-conspirators in an executed scheme to extort money, the essence of the complaint being the extortion, and not the conspiracy, a recovery may be had against one, it appearing that he alone was concerned; and therefore an amendment, leaving out the element of conspiracy, does not change the cause of action, and is unnecessary, and, though made more than six years (the period of limitation) after the cause of action arose, is harmless.—FILLMAN V. RYON, Penn., 32 Atl. Rep. 89.

18. CONSPIRACY—Evidence.—In an action on account of an alleged conspiracy between defendant and another, evidence as to acts of the other is inadmissible, in the absence of any evidence to show a conspiracy. —HART V. HICKS, Mo., 31 S. W. Rep. 251.

19. CONSTITUTIONAL LAW—Limitations—School Districts.—Act June 17, 1893, which provides that when any person has paid money into any incorporated school district, and bonds have been issued by such corporation therefor, which are illegal, and where limitations have run against the original consideration for which said bonds were issued, then the statute shall be extended, and the person so paying money for such illegal bonds shall have a right of action against such corporation for one year from the time this act takes effect, is unconstitutional, as depriving persons of property without due process of law, since a completed bar of the statute of limitations is a vested right.—BOARD OF EDUCATION OF NORMAL SCHOOL DIST. V. BLODGETT, Ill., 40 N. E. Rep. 1025.

20. CONTEMPT—Inability to Obey Order.—Where it appeared, in a proceeding for contempt in not paying over money fraudulently withheld, as per order of court, that defendant was unable to obey the order because of insolvency, and there was no evidence that he put himself in that condition after the order was made, or in anticipation thereof, for the purpose of defeating the same, it was proper to dismiss the proceeding.—ADAIR V. GILMORE, Ala., 17 South. Rep. 544.

21. CONTRACTS. — Certificate of Engineer.—A provision in a construction contract that the engineer or architect of the owner shall finally determine, as between the contractor and owner, what work has been done, and the amount to be paid for it, is valid, and should be enforced, in the absence of fraud or palpable mistake.—MUNDY V. LOUISVILLE & N. R. CO., U. S. C. C. of App., 67 Fed. Rep. 633.

22. CONTRACTS — Menace. — A contract for sale of stock, which plaintiff owned and had pledged to a bank, was not obtained by "menace," within the definition of Civ. Code, § 1570, "a threat of injury to the character," where defendant said that he would inform the bank that plaintiff was not the owner of the stock if plaintiff did not make the contract. — BANCROFT V. BANCROFT, Cal., 40 Pac. Rep. 488.

23. CONTRACT FOR SERVICES AS HOUSEKEEPER.—The marriage of a woman who has contracted to keep house for a man and take care of him during his life does not, as a matter of law, disqualify her to perform the contract, where the husband is willing that she should perform her duties.—EDGECOMB V. BUCKHOUT, N.Y., 40 N. E. Rep. 991.

24. CORPORATION—Corporate Property—Purchase by Director.—A purchase by a director, who is also the manager of the corporation, of the corporate property, which is subsequently ratified by the stockholders, and which is not fraudulent in fact, is not fraudulent in law, as against corporate creditors. — CRYMBLE V. MULVANEY, Colo., 40 Pac. Rep. 499.

25. CORPORATION — Liability of Stockholders. — A corporation created by and under the laws of Tennessee, or any other jurisdiction, cannot come to Florida, and exercise corporate functions here, without becoming incorporated under the laws of Florida; and, if it attempts to do so, its liabilities contracted here rest upon its members or stockholders in this jurisdiction as partners, and they will here be treated as, and held to be, merely partners.—TAYLOR V. BRANHAM, Fla., 17 South. Rep. 552.

26. CORPORATION — Subscription to Corporate Stock. —Reasonable performance only of conditions to a subscription for stock, in a public or private corporation is required, before a subscriber can be compelled to pay his subscription.—HALL V. SIMS, Ala., 17 South. Rep. 534.

27. COVENANTS — Guaranty of Lease.—A written instrument, executed and delivered by the assignor of a lease contemporaneously with its assignment, stipulating that the lease "is genuine and in full force and effect," and guarantying to the assignee "the rights and title of said lease," is founded on a sufficient consideration, and amounts to a covenant of seisin by the assignor of the demised premises, and that the assignee shall peaceably enjoy the same during the term of the lease, according to its provisions.—WETZEL V. RICHCREEK, Ohio, 40 N. E. Rep. 1004.

28. CRIMINAL LAW—Bills of Exceptions.—Under Rev. St. 1894, § 1916 (Rev. St. 1881, § 1847), in a criminal prosecution all bills of exceptions must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding 60 days from the time judgment is rendered.—BRUCE V. STATE, Ind., 40 N. E. Rep. 1069.

29. CRIMINAL LAW — Insanity as a Defense.—An accused has the burden on him of establishing a plea of insanity to the satisfaction of the jury, beyond a reasonable doubt. The State is not bound to affirmatively prove the sanity of the accused.—STATE V. CLEMENTS, La., 17 South. Rep. 502.

30. CRIMINAL PRACTICE — Forgery—Indictment.—An indictment for forging a deed purporting to have been executed by one Hannah McCormick,—the copy of such deed set out in the indictment being signed "Hannah McGormick,"—is insufficient without an express allegation that the forged signature was intended for "Hannah McCormick."—STATE v. MCCORMICK, Ind., 40 N. E. Rep. 1089.

31. CRIMINAL PRACTICE — Receiving Stolen Goods—Ownership.—Where an indictment for receiving stolen goods alleges the ownership of the stolen goods to be in an incorporated company therein named, it is unnecessary to prove the technical legality of the incorporation of such company. The indictment in such cases is sufficient if it alleges simply that the owner is a corporation, and the proof to sustain such allegation is sufficient if it shows that the alleged corporate owner is a corporation *de facto*, actually doing business as such.—BUTLER v. STATE, Fla., 17 South. Rep. 551.

32. CRIMINAL TRIAL — Witness.—Evidence that one who testified on the preliminary examination is absent from the State without any showing as to the time of his return, does not render admissible evidence given by him on such preliminary examination.—THOMPSON v. STATE, Ala., 17 South. Rep. 512.

33. DEATH BY WRONGFUL ACT—Right to Sue.—Rev. St. 1894, § 267 (Rev. St. 1881, § 266), providing that a father may sue for the injury or death of a child, confers no right upon one who marries the mother of a bastard child, and receives the child into his home as a member of his family, to sue for the death of the child.—THORNBURG v. AMERICAN STRAWBOARD CO., Ind., 40 N. E. Rep. 1062.

34. DEEDS — Married Women.—Land belonging to H, a married woman, was conveyed by deed purporting to be executed by J and H, his wife: Held, that the fact that the wife's name followed that of the husband did not show that she joined in the deed merely to release her dower; she appearing in the deed as one of the parties, conveying all her interest in the land.—LAKE ERIE & W. R. CO. v. WHITHAM, Ill., 40 N. E. Rep. 1014.

35. DEED—Right of Way.—A condition in a deed of a right of way for erection of a station, the character of which is not specified, is complied with by erection of a board shed, without the placing of an agent there, it being in structure and management like most of the stations on the road.—CALDWELL v. EAST BROAD TOP RAILROAD & COAL CO., Penn., 32 Atl. Rep. 85.

36. DEED—Sale of Land.—Act May 14, 1852, provided that if a widow married a second time, holding real estate by virtue of her previous marriage, she could not, during such marriage, alienate such realty, and if, during such marriage, she should die, the realty should go to her children by the previous marriage: Held, that a deed by one, jointly with her second husband, of land received by virtue of her previous marriage, conveyed no title; and, on her death during her second marriage, such land went to her child by her previous marriage.—HORLACHER v. BRAFFORD, Ind., 40 N. E. Rep. 1078.

37. DEED ABSOLUTE—Mortgage. — Defendant held a second mortgage on plaintiff's land. On default on the first mortgage, both mortgagees threatened to foreclose, whereupon plaintiffs conveyed the land absolutely to defendant, who took possession, and leased part of the premises for a small rental to plaintiffs, and assumed the payment of the first mortgage, and each of the parties executed to the other a release of all claims: Held, that the evidence was not sufficient to show the deed a mortgage.—AHERN v. MCCARTHY, Cal., 40 Pac. Rep. 482.

38. DESCENT AND DISTRIBUTION—Rights of Bastards.—Bastards have generally no inheritable blood, and save by express statutory enactment, cannot take by descent.—HICKS v. SMITH, Ga., 22 S. E. Rep. 153.

39. DRAINAGE— Agreement as to Drain.—Where a tile drain is, by agreement of adjacent landowners, laid across their lands for the benefit thereof, one of them may lower the tile on his land, no water being thus carried over the land of the other, through the drain, which would not have flowed through the ground along the line of the drains. — HENDERSON v. MCALLISTER, Ind., 40 N. E. Rep. 1071.

40. EVIDENCE—Negligence.—Res Gestæ.— In an action for an injury caused by an electric car, a statement made by the motorman just when the car stopped, and while the plaintiff was under it, that "he could not reverse the car, the reason he did not stop it," is admissible as part of the *res gestæ*.— SPRINGFIELD CONSOLIDATED RY. CO. v. WELSH, Ill., 40 N. E. Rep. 1034.

41. EVIDENCE—Presumption of Death.—Absence for seven years, although it is presumptive evidence of death, does not of itself raise a presumption that the absent party died at any time before expiration of the seven years.—REEDY v. MILLIZEN, Ill., 40 N. E. Rep. 1028.

42. EVIDENCE OF CUSTOM — Brokers.— Evidence of custom is admissible to explain or vary an express and unambiguous contract only when the contract contains terms to which such custom has given a meaning different from that which they primarily bear.—FAIRLY v. WAPPOO MILLS, S. Car., 22 S. E. Rep. 108.

43. EXECUTION — Appraisement. — A finding of fact that real estate sold on execution "had in all things been duly appraised according to law" sufficiently shows an appraisement of the rents and profits before sale, though the finding also recites that the "appraisement returned with the execution contains only an appraisement of the real estate."—LYTTON v. BAIRD, Ind., 40 N. E. Rep. 1063.

44. EXECUTION—Sale — Return.— The title of a purchaser at an execution sale cannot be defeated by mere defects or omissions in the return made by the sheriff after the sale, where no irregularity in the proceedings is shown.—KING v. DUKE, Tex., 31 S. W. Rep. 335.

45. FEDERAL COURTS — Following State Decisions.—Where State statutes, affecting the title to large tracts of land, have been construed by the State Supreme Court, and the title so established has been reaffirmed by the United States Supreme Court, which decisions have remained unchallenged for many years, comity does not compel a Federal court, when the title is again called in question, to follow a later decision of the State courts adverse to the title established by the earlier decisions.— WILSON v. WARD LUMBER CO., U. S. C. C. (Mo.), 67 Fed. Rep. 675.

46. FEDERAL COURTS—Jurisdiction—Citizenship.—An allegation that the citizenship of a party or parties is unknown is insufficient to sustain the jurisdiction of the Federal courts, as the requisite citizenship must distinctly appear.— TUG RIVER COAL & SALT CO. v. BRIGEL, U. S. C. C. of App., 67 Fed. Rep. 625.

47. FRAUDS, STATUTE OF—Contract of Minor.—The contract of a minor to pay the principal and interest of money loaned him to carry on business not being void, the promise of another to answer for such debt is within the statute of frauds.—BROWN v. FARMERS' & MERCHANTS' NAT. BANK OF CLEBURNE, Tex., 31 S. W. Rep. 285.

48. FRAUDS, STATUTE OF—Parol Sale.—A parol contract for the sale of a growing perennial crop is taken out of the statute of frauds by the purchaser's entry on the land with the owner's consent to harvest the crop.—MOWREY v. DAVIS, Ind., 40 N. E. Rep. 1108.

49. FRAUDS, STATUTE OF—Parol Trust.—In an action by the heirs of the beneficiary against the devisees of an alleged trustee to enforce the trust, it appeared that the land was purchased by the alleged trustee, who took a deed to himself with the intention of afterwards giving it to his son, plaintiff's father, but no deed was ever made to the son, nor the intention of making it ever reduced to writing, that the property was afterwards devised to defendants: Held, that the

alleged trust cannot be enforced, it being void, under the statute of frauds.—SHERLEY v. SHERLEY, Ky., 31 S. W. Rep. 275.

50. FRAUDULENT CONVEYANCES—Action by Assignee.—An assignee cannot recover property conveyed in fraud of creditors several months before the insolvency proceedings were instituted.—MILLER v. KEHOE, Cal., 40 Pac. Rep. 485.

51. FRAUDULENT CONVEYANCES — Burden of Proof.—Gifts from husband to wife are constructively fraudulent, as against existing creditors of the former, and the burden is on the donee to show that such gifts preceded the contraction of the husband's debt.—MCTEERS v. PERKINS, Ala., 17 South. Rep. 547.

52. GIFT—Capacity of Donor—Verdict.—On the issue as to whether a donor had sufficient mental capacity to make a valid gift *inter vivos*, a finding in a special verdict that the donor was of "unsound mind" is a mere conclusion of law, and not a statement of the facts which the jury in such a verdict is required to find, as unsoundness of mind may exist on certain subjects without affecting the donor's capacity to make a valid gift.—LEWIS v. TEEGARDEN, Ind., 40 N. E. Rep. 1047.

53. GUARANTY — Consideration.—In an action by an assignee on a guaranty executed to plaintiff's husband for rent under a lease of his property making rents payable to her, plaintiff and her husband testified that the guaranty, the date of which was blank, was executed before the delivery of the lease, and as part of the same transaction. The guarantor admitted that when he signed the guaranty he did not know whether the lease had been delivered, or whether the lessee was in possession of the premises: Held, that the guaranty was good under Civ. Code, § 2792, providing that, where an original obligation is entered into in consideration of a guaranty, no other consideration is necessary for the guaranty.—CUNNINGHAM v. NORTON, Cal., 40 Pac. Rep. 491.

54. HOMESTEAD — Abandonment.—The facts that defendant rented out the cultivable part of his homestead, and permitted the father of the tenant to occupy a room in his house rent free, and that he was frequently away from home for a week or 10 days at a time on business, do not show an abandonment of the homestead.—METCALF v. SMITH, Ala., 17 South. Rep. 587.

55. HUSBAND AND WIFE — Tenancy by Entirety.—A conveyance of land to a husband and wife in fee creates a tenancy by the entirety, and each is entitled to possession of the whole estate, as against third persons.—BAINS v. BULLOCK, Mo., 31 S. W. Rep. 342.

56. INJUNCTION—Against Action at Law.—Where, in a suit by the grantor in a deed to reform it on the ground of mistake, the bill and complainant's affidavit fail to show that the mistake was mutual, an injunction will not lie to restrain the grantee from an action at law on the covenants.—ROMMEL v. MASS, N. J., 32 Atl. Rep. 127.

57. INJUNCTION—Collection of Debt in Foreign State.—One from whom money has been collected by garnishment proceedings in a foreign State, in violation of an injunction granted by a court of Indiana, may recover it in an action instituted for that purpose.—MAIN v. FIELD, Ind., 40 N. E. Rep. 1103.

58. INJUNCTION—Restraining Official Acts.—It is well settled that a court of equity has no power by injunction to restrain public officers from performing any official act that they are by law required to perform.—MENDENHALL v. DENHAM, Fla., 17 South. Rep. 561.

59. INSURANCE — Conditions.—Where four dwelling houses insured were burned, the fact that two of them were unoccupied, thus vitiating the policy as to them, does not prevent recovery for the other two, which were occupied.—SPEAGLE v. DWELLING-HOUSE CO., Ky., 31 S. W. Rep. 282.

60. INSURANCE — Conditions.—The issuance of a policy to "K and Z and F Z," on a building and merchandise, with knowledge by the agent that K and Z own the building, and F Z alone the goods, is a waiver of the provision in such policy providing for a forfeiture "if the interest of the insured be other than unconditional and sole ownership."—MANCHESTER FIRE ASSUR. CO. v. KOERNER, Ind., 40 N. E. Rep. 1110.

61. INSURANCE — Warranty.—A policy of insurance had a slip attached thereto containing the only description of the property insured, and the "iron safe clause" provided that such clause was a warranty, and a part of the contract: Held to constitute a warranty, a breach of which would avoid the policy.—HOME INS. CO. OF NEW ORLEANS v. CARY, Tex., 31 S. W. Rep. 321.

62. INSURANCE—Warranty in Application.—In an application for fire insurance, containing at its close a clause that "applicant warrants that the foregoing is a full and true exposition of all the facts and circumstances, conditions, situations, and value of and title to the property to be insured, and is offered as a basis of the insurance requested, and is made a special warranty," the answer "Yes" to the question, "Do you agree to keep merchandise and cash accounts?" is a mere representation, and not a warranty.—ÆTNA INS. CO. OF HARTFORD, CONN. v. NORMAN, Ind., 40 N. E. Rep. 1116.

63. JUDGMENT AGAINST INFANT.—A judgment at law against an infant who was properly served is not void and subject to collateral attack because no guardian *ad litem* was appointed to defend the suit.—LEVYSTEIN v. O'BRIEN, Ala., 17 South. Rep. 550.

64. JUDGMENT IN FAVOR OF GUARDIAN.—Where the guardian of a minor recovers a judgment for libel against the proprietor of a newspaper, and, after the minor attains her majority, she settles with the proprietor, and executes a release of the judgment, an *ex parte* order forbidding the issuing of an execution on the judgment is not binding on the guardian.—CURRAN v. ABBOTT, Ind., 40 N. E. Rep. 1091.

65. LANDLORD AND TENANT—Illegal Distress—Damages.—Where, in an action for rent, a distress warrant has been issued, and defendant denies the existence of the debt, pleads a set-off for plaintiff's failure to comply with the rental contract, and asks actual and exemplary damages for illegally suing out the distress warrant, actual damages are sufficiently alleged to admit evidence thereof.—SMITH v. JONES, Tex., 31 S. W. Rep. 306.

66. LANDLORD AND TENANT—Leases—Repairs.—In the absence of a provision in a lease that the lessor shall repair, it is no defense to an action for rent that the premises were not tenantable.—REEVES v. MCCOMESKEY, Penn., 32 Atl. Rep. 96.

67. MALICIOUS PROSECUTION— Burden of Proof.—In an action for malicious prosecution, a charge that plaintiff must show such facts as will warrant the jury in finding malice and want of probable cause is not erroneous, as leaving to the jury the determination of what constitutes probable cause.—SANDELL v. SHERMAN, Cal., 40 Pac. Rep. 493.

68. MARRIAGE—Evidence— Reputation.—On an issue of marriage between S, who subsequently became a lunatic, and decedent, it appeared that S was the father of decedent's child, and, that about a year before its birth, he told witness that decedent was his wife, and the record of the child's birth, the receipt for its burial expenses, checks drawn by S to decedent's order, and decedent's signature thereon and on deeds, showed a marriage of the parties. Insurance maintained by S on his life was made payable to decedent as his wife, and decedent was known in her social circle as S's wife, and children of S by a former marriage treated her as such: Held, that a finding that there was a marriage was justified.—APPEAL OF BONOWITZ, Penn., 32 Atl. Rep. 98.

69. MASTER AND SERVANT—Assumption of Risk.—An employee who, after assisting his employer to prop up a falling beam in a place of work in what is known by

him to be an insecure manner, remains at work in the same place, assumes the risk of injury from this defect.—LUCEY v. HANNIBAL OIL CO., Mo., 31 S. W. Rep. 340.

70. MASTER AND SERVANT—Fellow-servants.—Under Gen. Laws 1891, ch. 24, which declares all persons fellow-servants who are engaged in the common service of a railway company, and are working together at the same time and place to a common purpose, of same grade, conductors of switch engines in the same yard, engaged in moving cars, etc., under a common superior, but whose duties are separate and distinct, are fellow-servants.— TEXAS & N. O. R. CO. v. TATMAN, Tex., 31 S. W. Rep. 333.

71. MASTER AND SERVANT— Fellow-servants. — It is proper to charge that, to constitute fellow-servants, the servants should be actually co-operating at the time of the injury in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety.—CHICAGO & A. R. CO. v. O'BRIEN, Ill., 40 N. E. Rep. 1023.

72. MASTER AND SERVANT—Negligence—Evidence.—A night watchman was found dead under an unrailed bridge connecting two buildings, which he customarily crossed in the performance of his duties: Held, in an action to recover damages for his death, evidence was admissible which tended to show what kind of a man he was in respect to health, vigor, activity, and sobriety, and his bodily mental peculiarities.—OVERMAN WHEEL CO. v. GRIFFIN, U. S. C. C. of App., 67 Fed. Rep. 659.

73. MASTER AND SERVANT—Negligence of Fellow-servant.—An employer is not liable for an injury to an employee caused by a fellow-servant dropping his end of a bar of iron which they were carrying together, because at the time he was overcome by the paralyzing effect of strong language used by the foreman in an altercation half an hour before with one of their fellow-servants.—BURLINGTON & M. R. R. CO. v. BUDIN, Colo., 40 Pac. Rep. 503.

74. MECHANIC'S LIENS—Statement of Claim.—A claim for a mechanic's lien, filed by a subcontractor, which fails to specify the items of the account forming the basis of the claim, and which alleges, as to when the work was done, merely that it was performed between certain days of different months, is fatally defective.—MCFARLAND v. SCHULTZ, Penn., 32 Atl. Rep. 94.

75. MORTGAGE—Redemption.—The senior mortgagee, in whose favor a decree of foreclosure has been rendered, cannot redeem from a previous sale under a junior lien, but may take out a precept, and sell the land, regardless of such prior sale.—DAWSON v. OVERMYER, Ind., 40 N. E. Rep. 1065.

76. MORTGAGE — Trust Deed—Injunction. — The existence of a lien for a small paying tax is not such a cloud on the title as to warrant the enjoining of a sale under a deed of trust given for the price thereof, as the trustee can be compelled to pay the tax out of the purchase money.—PATCH v. MORRISETT, Va., 22 S. E. Rep. 173.

77. MORTGAGE BY MARRIED MINOR— Rescission. — Rev. St. 1894, § 3364 (Rev. St. 1881, § 2944), providing that in all sales by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale, until she shall first restore the consideration received, "conveyance" includes mortgages.—UNITED STATES SAVING FUND & INVESTMENT CO. v. HARRIS, Ind., 40 N. E. Rep. 1072.

78. MORTGAGE FORECLOSURE—Parties.—Where a complainant who purchased at foreclosure sale a portion of the mortgaged premises files a bill for strict foreclosure, against a defendant who purchased the same portion of the mortgaged premises from an owner of the whole premises, who was not made party to the foreclosure suit, and whose rights were not foreclosed, it is not necessary that the persons interested in the remaining lands, either as succeeding to the original mortgagor or mortgagee, should be made parties.—PETTINGILL v. HUBBELL, N. J., 32 Atl. Rep. 76.

79. MUNICIPAL CORPORATION—Construction of Sewer. —The servitude imposed upon private property by the construction of a public sewer thereon involves such an actual possession by the public of that portion of the land taken up by such sewer as excludes the owner from the occupancy thereof. For such an appropriation of his property to the public use an action accrues to the owner, and the measure of his damages is the value of the land so appropriated. In estimating such value, the fact that the owner could still apply the premises to any use not inconsistent with the servitude for sewer purposes may properly be considered by the jury.—CITY OF ATLANTA v. HUNNICUTT, Ga., 22 S. E. Rep. 130.

80. MUNICIPAL CORPORATION— Contract.—A contract between a city and a water company provided that the latter should put in such further number of fire hydrants upon street mains as may be ordered by said city council, "provided that the cost and expense of all such further number of hydrants and of the putting in of the same shall be paid by said city:" Held, that the city was liable only for the actual sum expended by the company in putting in such hydrants, and not for what such work was reasonably worth.—BULL v. CITY OF QUINCY, Ill., 40 N. E. Rep. 1035.

81. MUNICIPAL CORPORATION—Extension.—Where the State adds territory to a political subdivision, it is not within the power of the latter to so fix the boundary as to exclude from its limits a part of the territory intended to be added to the municipality.—MAYOR, ETC., OF MONROE v. POLICE JURY OF OUACHITA PARISH, La., 17 South. Rep. 498.

82. MUNICIPAL CORPORATION—Powers — Removal of Garbage.—The preservation of health and the maintenance of cleanliness are not foreign to the ends of a municipal corporation. Where the legislature confers express powers upon the municipality to pass ordinances to protect health and maintain cleanliness, an ordinance adopted in order to remove and destroy animal and vegetable matter is not necessarily a nullity and unreasonable. The purpose of the ordinance is within the scope of the express legislative power.—STATE v. PAYSSAN, La., 17 South. Rep. 481.

83. MUNICIPAL CORPORATIONS—Restraining Bond Issue.—Where a bill in equity to restrain a proposed issue and sale of municipal bonds shows no other valid reason why such issue and sale should be estopped, except that the proceeds of the sale of such bonds will go into, and be expended by, improper hands, it is error to enjoin the issue and sale of such bonds, or to go further with an injunction, in such a case, than to restrain the delivery of such bonds when issued, to unauthorized hands, and to prohibit the proceeds thereof from going into the hands of, and being expended by, unauthorized persons. — CITY OF TAMPA v. SALOMONSON, Fla., 17 South. Rep. 581.

84. MUNICIPAL CORPORATION—Street Improvements.—Const. art. 11, §§ 5, 7, prohibit a city from creating a debt without providing for its payment. The charter and ordinances of the city of Dallas provide that property owners shall be liable for street improvements, and that no contractor shall have a claim against the city for such work done under contract with the city: Held, that the city is not liable to contractors for extra street improvements directed by the city engineer, which were not included in the specifications or contract, and for which no provision for payment was made.—CITY OF DALLAS v. BROWN, Tex., 31 S. W. Rep. 298.

85. NEGLIGENCE — Dangerous Fence — Injury to Animals.—Land, previously used as a common, and having roads crossing it, over which stock had been accustomed to pass, was fenced by the owner with barbed wire, and plaintiff's horse, being insecurely staked near the fence, escaped during the night, and

was killed by coming in contact therewith, at a point where it crossed over the roads: Held, that the questions of defendant's negligence in not constructing the fence at that point so stock would not be injured thereby, and plaintiff's contributory negligence, should have been submitted to the jury.—BROWN v. COOPER, Tex., 31 S. W. Rep. 316.

86. NEGLIGENCE — Sufficiency of Complaint. — In an action for personal injuries, a general allegation that plaintiff was free from contributory negligence is sufficient, unless the specific facts alleged show that his own negligence contributed to his injury.—EUREKA BLOCK COAL CO. v. BRIDGEWATER, Ind., 40 N. E. Rep. 1101.

87. NEGOTIABLE INSTRUMENT—Actions on Note—Party. —A promissory note, payable to the order of a named payee, not having been indorsed or otherwise assigned in writing, so as to vest the legal title in the person to whom the same was delivered as collateral security, the action upon the note was properly brought in the name of the original payee for the use of the person to whom the same was so delivered.—BENSON v. ABBOTT, Ga., 22 S. E. Rep. 127.

88. NEGOTIABLE INSTRUMENT—Merger.—A note is not merged in a judgment note given to the payee as additional security for the original note.—WITZ v. FITE, Va., 22 S. E. Rep. 171.

89. PARTIES—Action on Life Insurance.—In an action at law on a life insurance policy, by the administratrix of the insured, who has possession of the policy, a person who claims the policy under an alleged assignment by the insured, in his lifetime, is not an indispensable party.—NEW YORK LIFE INS. CO. v. SMITH, U. S. C. C. of App., 67 Fed. Rep. 694.

90. PARTNERSHIP—Novation.—The law is well-settled that where A owes B, and C owes A, and C agrees with A to pay the debt that A owes to B, and that thereupon C's indebtedness to A shall be extinguished and discharged, in such a case B cannot sue and recover his claim against A out of C upon the latter's promise to A to pay it, unless B has extinguished his claim against A in whole or in part, and agreed to accept C as his debtor instead of A. In such a case, in the absence of assent on the part of B and his release of A, there is no privity of contract as between B and C that will support an action by B against C upon the latter's promise made to A. The novation can exist only by the mutual consent and agreement of all the interested parties.—TYSEN v. SOMERVILLE, Fla., 17 South. Rep. 867.

91. PARTNERSHIP — Surviving Partners.—The failure of a surviving partner to file an inventory of the late firm's property, and of its creditors and liabilities, and a bond as surviving partner, as required by Rev. St. 1894, §§ 8123, 8127 (Rev. St. 1881, §§ 6047-6051), did not invalidate a mortgage given by him on the partnership assets.—CORTLAND FORGING CO. v. FIRST NAT. BANK OF FT. WAYNE, Ind., 40 N. E. Rep. 1071.

92. PLEADING—Election to Take under Will.—A complaint in an action by a widow to set aside a written election to take under her husband's will, procured by defendants through fraud, which failed to allege that plaintiff desired to take against the will, and was prevented from doing so by reason of defendants' fraud in procuring the written election, was insufficient on demurrer.—BURDEN v. BURDEN, Ind., 40 N. E. Rep. 1067.

93. RAILROAD COMPANIES — Consolidation.—Where two railroad companies are consolidated under authority, the presumption of law is, until the contrary appears, that the united company is subject to all the liabilities of those out of which it is created, and may be sued thereon under its new name as if no change had been made in the organization of the original corporations.—LANGHORNE v. RICHMOND RY. CO., Va., 22 S. E. Rep. 159.

94. RAILROAD COMPANIES—Horse and Street Car Companies.—A steam railroad company, which, by permission of the city council, has laid its tracks across a city street, cannot enjoin a street-car company from laying its track along such street and across its tracks, where the street-car company is authorized to do so by the city council, and where it proposes to construct the crossing at its own expense, without injuring the railroad tracks, since the use of a street by street cars, whether propelled by horse power or electricity, does not constitute an additional servitude.—CHICAGO, B. & Q. R. CO. v. WEST CHICAGO ST. R. CO., Ill., 40 N. E. Rep. 1008.

95. RAILROAD COMPANY — Negligence.—Under the statute in force prior to 1887 giving a cause of action where the death of any person was caused by the "negligence" of the proprietor, owner, charterer, or hirer of any railroad; or by the unfitness, "gross negligence," or carelessness of their servants, to entitle a person to recover on account of the negligence of the company's servants the negligence must have been "gross."—INTERNATIONAL & G. N. R. CO. v. KUEHN, Tex., 31 S. W. Rep. 322.

96. RAILROAD COMPANY — Negligence of Independent Contractor.—A railroad employee who is injured by stepping on a grain door left beside the track cannot recover from the company in the absence of any proof that the door was placed there by some one for whose acts defendant would be liable, or that defendant had knowledge of the obstruction, or, by the exercise of ordinary care, could have discovered it.—BURNS v. KANSAS CITY, FT. S. & M. RY. CO., Mo., 31 S. W. Rep. 347.

97. RAILROAD CROSSING — Negligence.—Though plaintiff testified that he stopped, looked, and listened 15 or 18 feet from the track, where the track was visible for half a mile, yet where the horse was struck by a train just as it got on the track, and the person who was driving testified that they did not stop, and disinterested witnesses testified that they did not stop, look, or listen, but were talking and laughing, and that the train could be plainly seen and heard, a verdict should have been directed for defendant.—HOLDEN v. PENNSYLVANIA R. CO., Penn., 32 Atl. Rep. 108.

98. RECEIVER — Removal of Trustee.—In an action to remove a trustee for the benefit of creditors of a private corporation, who had full power to continue or cease the business, and for the appointment of a receiver in his stead, a court of chancery is not justified in appointing a receiver for the purpose of indefinitely continuing the business until the creditors are paid out of the income, and not merely to hold *pendente lite* for the removal of the trustee.—ETOWAH MIN. CO. v. WILLS VAL. MIN. & MANUF'G CO., Ala., 17 South. Rep. 522.

99. RES JUDICATA—Default Judgment.—Where an action was brought against an executor upon a demand due by his testator, and no defense was made, the judgment was properly entered against the defendant *de bonis testatoris*, and amounted to a conclusive admission of assets on the part of the executor. Execution having issued, a return of *nulla bona* having been made, and a subsequent action upon this judgment having been brought against the executor in his individual capacity, it was too late for him to plead or prove as a defense a want of assets existing at the time when the original suit was brought.—PHIPPS v. ALFORD, Ga., 22 S. E. Rep. 152.

100. SALE—False Representations — Rescission.—Defendant bought a patented machine from plaintiff, on the false representation that the right to use the patent was not disputed. On being sued by a patentee, who claimed that the machine infringed his patent, defendant demanded and plaintiff promised to give an indemnifying bond: Held, that such promise was upon a sufficient consideration, and its breach justified defendant in rescinding the contract of sale.—PRATT v. PARIS GASLIGHT & COKE CO., Ill., 40 N. E. Rep. 1032.

101. SALE—Title Acquired.—Plaintiff sold goods to one who afterwards countermanded the order, but not

until the goods had been shipped, whereupon plaintiffs asked that the consignee hold the goods subject to their order. The consignee took possession of the goods, and sold them to defendant: Held, that defendant acquired no better title than his vendor had, which was that of bailee for plaintiffs.—LEFFLER V. WATSON, Ind., 40 N. E. Rep. 1107.

102. STATUTES— Enactment — Constitutional Law. — Courts will not go behind a statute authenticated as required by Const. art. 4, § 25, by the signatures of the presiding officers of the two houses of the legislature, to see whether it was passed within two days of the adjournment, in violation of article 5, § 14.—WESTERN UNION TEL. CO. V. TAGGART, Ind., 40 N. E. Rep. 1051.

103. TRUST—Husband and Wife.—In an action by a divorced wife against her former husband to establish a trust in land held by him, it appeared that when the parties were married defendant had no property; that defendant rented a farm of his father, and that this farm was afterwards conveyed to defendant; that plaintiff had joined with defendant in the execution of trust deeds to secure loans, describing the land as defendant's; that in former litigation between them plaintiff had spoken of the land as defendant's, and asked to be allowed a part thereof; and while the parties lived together plaintiff allowed defendant to receive a large amount of money that she had inherited, but there was no direct evidence that this money went into the land in question: Held, insufficient to entitle plaintiff to a decree.—THROCKMORTON V. THROCKMORTON, Va., 22 S. E. Rep. 162.

104. TRUST DEED—Power of Sale.— A trust deed of land provided for a sale on default, "as in cases of foreclosing mortgages, by bill in chancery, by some suitable person, to be appointed in writing by any person interested in such trust fund:" Held, that a conveyance to a purchaser at a sale conducted as a sale under judicial process, by a person appointed in writing by one interested in the debt, conveyed to him the legal title.—LANG V. STANSEL, Ala., 17 South. Rep. 516.

105. TRUST AND TRUSTEE—Misappropriation of Fund —Equity.—Where money was contributed to establish an industrial school for colored youths, the contributors cannot require trustees to account, as for a misappropriation of the trust fund, merely because the trustee subsequently appropriated a part of the fund for a church.—CLARK V. OLIVER, Va., 22 S. E. Rep. 175.

106. VENDOR AND VENDEE—Purchaser of Land.—The title of a purchaser in good faith from the vendee in a sale with a power of redemption after the sale has become absolute, by reason of the non-exercise of the right of redemption, is secure against an attack from the original vendor or his creditors, on the ground that the "sale with redemption" was really a contract for security which did not shift the ownership. The purchaser is not affected by secret equities, unknown to him, or not disclosed by the record.—BROUSSARD V. WEST, La., 17 South. Rep. 476.

107. VENDOR AND VENDEE—Estoppel.—An agreement to sell certain lands, in case they are acquired by the promisor, and divide the proceeds with another, is not such a conveyance as operates as an estoppel, when title is subsequently obtained by him.—OLIPHANT V. BURNS, N. Y., 40 N. E. Rep. 980.

108. VENUE—Practice.—Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made, or where the breach occurs, etc., is merely permissive; and by joining another defendant, whose residence is in a different county, plaintiff waives the benefit of such provision. — GRIFFIN & SKELLEY CO. V. MAGNOLIA & HEALDSBURG FRUIT-CANNERY, Cal., 40 Pac. Rep. 495.

109. WATER COURSE—Easement.—In an action for damages for damming a ditch running through defendant's land, and used to drain the land of plaintiff, when the proof shows only a parol contract for the easement claimed, and there was no independent assertion of right to the ditch by plaintiff open and adverse to the rights of defendant, on which a presumption could be raised, a peremptory instruction to find for defendant should be given.—DUNHAM V. JOYCE, Mo., 31 S. W. Rep. 337.

110. WATER—Pollution.—A complaint for nuisance, charging defendant with polluting the waters of a river with offensive matter from "a sawmill, outhouses, stables, and other fixtures which usually accompany a sawmill," will embrace a finding that the cause of pollution was a hog pen and the manure pile of a stable maintained in connection with the sawmill.—PEOPLE V. ELK RIVER MILL & LUMBER CO., Cal., 40 Pac. Rep. 486.

111. WILLS—Charges on Land Devised. — Testator gave all his real estate to two sons for $2,500, and provided that upon the death of his widow, and after all personal property was sold, what was left should be equally divided between his 10 children: Held, that the $2,500 was a charge on the land.—IN RE WEILER'S ESTATE, Penn., 32 Atl. Rep. 101.

112. WILLS—Estate Devised.—Under a devise "to my adopted daughter, H, to have and to hold for and during the term of her natural life. And after the death of H I give and devise the reversion or remainder to her lawful issue, to have and to hold the same in common to them, their heirs and assigns, forever. And, in case the said H should die without leaving lawful issue, then the aforesaid real estate shall revert to my estate, and I give and devise the same to my heirs under the interstate laws,"—H takes a fee; the words "lawful issue" meaning lineal descendants, and having, *prima facie*, the force of words of limitation, and the words "in common" not being such superadded words of limitation or distributive modification as will make the words "lawful issue" words of purchase.—GRIMES V. SHIRK, Penn., 32 Atl. Rep. 113.

113. WILL—Caveat — Fraud.—The only ground of the caveat insisted upon at the trial being that the propounder and another had falsely and fraudulently represented to the testator that the caveatrix was not in fact his neice, and had by means of this fraud and deception induced him to disinherit her, and there being no evidence whatever that any such representations had ever been made except the declarations of the testator himself, the caveat was not sustained, and the verdict setting aside the will was without evidence to support it. The declarations of the testator were admissible to show the state of his mind at the time of executing the will, but were not admissible for the purpose of showing that the facts stated by him were true.—MALLERY V. YOUNG, Ga., 22 S. E. Rep. 142.

114. WILL — Residuary Clause.—After bequeathing legacies to certain heirs, testatrix's will recited: "It is my will that B, my step-sister, shall have a full share of my estate, share and share alike with my brothers and sisters." B was in fact testatrix's half-sister, and the estate consisted of personalty: Held, that such item disposed of the residue of the estate equally among testatrix's brothers and sisters and half-sister.—IN RE STRIEWIG'S ESTATE, Penn., 32 Atl. Rep. 83.

115. WILL — Vested Remainders.—Testator devised his estate to trustees, a portion of the income being payable to his wife, who was authorized, during the trust, to dispose of one-third of the personal property by will, and the remainder of the income to be paid in equal proportions to a daughter and three sons; and provided that if the daughter or either of two sons should die, leaving issue, the issue should take the parent's share; but power of disposition was not given to any child. The trust was to end on a fixed date, and the property was then to be paid to testator's legal representatives: Held, that the remainders did not vest on testator's death, so that, on the death of the daughter before the termination of the trust, her surviving husband became entitled to the income previously payable to her, or to any part of the principal of the estate.—EAGER V. WHITNEY, Mass., 40 N. E. Rep. 1046.